No. 06-1204
Vide 06-1039
Title: Republic of the Philippines, et al., Petitioners
v.
Jerry S. Pimentel, Temporary Administrator of the Estate of Mariano J. Pimentel, et al.
Docketed: March 6, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-16401, 04-16503, 04-16538)
Decision Date: September 12, 2006
Rehearing Denied: November 3, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 19 2007	Application (06A719) to extend the time to file a petition for a writ of certiorari from February 1, 2007 to March 5, 2007, submitted to Justice Kennedy.
Jan 22 2007	Response to application from respondents Mariano J. Pimentel, et al. filed.
Jan 24 2007	Application (06A719) granted by Justice Kennedy extending the time to file until March 5, 2007.
Mar 5 2007	Petition for a writ of certiorari filed. (Response due April 5, 2007)
Mar 26 2007	Waiver of right of respondents Estate of Roger Roxas and Golden Budha Corporation to respond filed.
Apr 2 2007	Brief of respondents Mariano J. Pimentel, et al. in opposition filed. VIDED.
Apr 17 2007	DISTRIBUTED for Conference of May 10, 2007.
Apr 17 2007	Reply of petitioners Republic of the Philippines, et al. filed. (Distributed)
Apr 24 2007	Reply of respondents Estate of Roger Roxas and Golden Budha Corporation to Pimental filed. VIDED. (Distributed)
Apr 24 2007	Reply of respondents Estate of Roger Roxas and Golden Budha Corporation to Republic of Phillipines al filed. VIDED.(Distributed).
May 14 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 28 2007	Motion to set a deadline for submission of an amicus brief by the Solicitor General filed by respondent Mariano J. Pimentel. (Vided) (CL Page 163)
Sep 5 2007	Motion DISTRIBUTED for Conference of September 24, 2007.
Sep 7 2007	Letter received from the Solicitor General. VIDED. (Distributed)
Sep 18 2007	Letter received from counsel for the respondents. VIDED. (Distributed)
Oct 1 2007	Motion to set a deadline for submission of an amicus brief by the Solicitor General DENIED.
Oct 24 2007	Letter, dated October 17, 2007, received from counsel for the respondents. VIDED.
Nov 2 2007	Brief amicus curiae of United States filed. VIDED.
Nov 13 2007	Supplemental brief of respondents Mariano J. Pimentel, et al. filed. (Distributed)
Nov 14 2007	DISTRIBUTED for Conference of November 30, 2007.
Nov 16 2007	Letter dated November 8, 2007, from counsel for Roger Roxas, et al., received and distributed. VIDED.
Nov 20 2007	Supplemental brief of petitioners Republic of the Philippines, et al. filed. (Distributed)

Dec 3 2007	Petition GRANTED In addition to the question presented by the petition, the parties are directed to brief and argue on the following question: Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have the right to seek this Court's review of the court of appeals's opinion affirming the district court.
Jan 17 2008	Joint appendix filed. (Statement of costs received)
Jan 17 2008	Brief of petitioners Republic of the Philippines, et al. filed.
Jan 22 2008	SET FOR ARGUMENT ON Monday, March 17, 2008.
Jan 24 2008	Brief amicus curiae of United States filed.
Jan 24 2008	Brief amicus curiae of Merrill Lynch, Pierce, Fenner & Smith Incorporated in support of neither party filed.
Feb 4 2008	Record received from U.S.C.A for the 9th Circuit. (1 envelope)
Feb 5 2008	CIRCULATED.
Feb 12 2008	Record received from U.S.D.C. for the District of Hawaii. (4 boxes)
Feb 19 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 19 2008	Brief of respondents Mariano J. Pimentel, et al. filed. (Distributed).
Feb 26 2008	Motion of Merrill Lynch, Pierce, Fenner & Smith Incorporated for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 26 2008	Brief amicus curiae of Philippine Human Rights Groups filed. (Distributed)
Feb 26 2008	Brief amicus curiae of Professors of International Law filed. (Distributed)
Mar 3 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 5 2008	Motion to substitute Jerry S. Pimentel, Temporary Administrator of the Estate of Mariano J. Pimentel, et al., and suggestion of death filed filed by respondent Mariano J. Pimentel, et al. (Distributed)
Mar 10 2008	Reply of petitioners Republic of the Philippines, et al. filed. (Distributed).
Mar 10 2008	Motion DISTRIBUTED for Conference of March 14, 2008.
Mar 14 2008	Motion of Merrill Lynch, Pierce, Fenner & Smith Incorporated for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Mar 14 2008	Motion to substitute Jerry S. Pimentel, Temporary Administrator of the Estate of Mariano J. Pimentel, et al., and suggestion of death GRANTED.
Mar 17 2008	Argued. For petitioner: Charles A. Rothfeld, Washington, D.C.; and Edwins S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Robert A. Swift, Philadelphia, Pa.

Supreme Court, U.S.
FILED

061204 MAR 05 2007

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This interpleader action was brought to settle ownership of assets misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed both by the Republic, which under Philippine law is the owner of property acquired though the misuse of public office by Philippine officials, and by a class of private judgment creditors of the Marcos estate. The Republic was dismissed from the action on sovereign immunity grounds. In the Republic's absence, however, the district court held that the Republic is not an indispensable party to the action under Fed. R. Civ. P. 19(b), proceeded to resolve the interpleader action, and awarded the disputed assets to the class of private claimants. The Ninth Circuit affirmed. The case presents the following question:

Whether a foreign government that is a "necessary" party to a lawsuit under Rule 19(a) and has successfully asserted sovereign immunity is, under Rule 19(b), an "indispensable" party to an action brought in the courts of the United States to settle ownership of assets claimed by that government.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

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OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-11a, 12a-20a, and 21a-29a) are reported at 464 F.3d 885, 448 F.3d 1072, and 446 F.3d 1019. The final order of the court of appeals denying petitioners' rehearing petition (App., *infra*, 61a-62a) is reported at 467 F.3d 1205. The orders of the district court regarding indispensability (App., *infra*, 55a-60a) and granting final judgment (App., *infra*, 43a-54a) are unreported.

JURISDICTION

After twice revising its opinion, the court of appeals entered its judgment on September 12, 2006, and denied a timely petition for rehearing on November 3, 2006. On January 24, 2007, Justice Kennedy extended the time for filing the petition for a writ of certiorari to March 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES PROVISION INVOLVED

Relevant portions of Rule 19 of the Federal Rules of Civil Procedure are reproduced at App., *infra*, 63a-64a.

STATEMENT

This case is an interpleader action brought to determine ownership of a portion of the assets stolen by Ferdinand E. Marcos while he was President of the Republic of the Philippines. The Republic claims the assets, to which it is entitled under Philippine law. The assets also are claimed by, among others, a class of plaintiffs who were injured by Marcos during his presidency and who obtained a judgment against the Marcos estate in an earlier, unrelated suit. The Republic successfully asserted its sovereign immunity and was dismissed from the interpleader action. In the Republic's absence, however, the district court held that the Republic is not an indispensable party under Fed. R. Civ. P. 19(b), adjudicated the interpleader suit, and awarded the assets in their entirety to the class of Marcos creditors. The Ninth Circuit affirmed, holding that the Republic's sovereign immunity did not bar

the suit from proceeding or prevent disposition of the assets claimed by the Republic.

The Ninth Circuit's holding is one of exceptional practical and doctrinal importance. By announcing a rule that permits the award of property claimed by a foreign government even when that government is absent from the litigation by virtue of its invocation of immunity, the decision below substantially undercuts the vital interests served by the doctrine of foreign sovereign immunity, threatening to cause considerable friction in the United States' relations with other nations. The analysis used by the Ninth Circuit to adopt that rule also conflicts with the holdings of this Court and other courts of appeals regarding Rule 19(b), injecting confusion and uncertainty into an important area of the law. And the Ninth Circuit's disposition of this case – awarding to private parties property that was stolen from the Republic by its former President and that is the subject of ongoing forfeiture litigation in the Philippines – directly interferes with the vital national interests of an important ally of the United States. Review by this Court accordingly is warranted.

1. In 1986, a popular uprising – the "people power" revolution – overthrew Ferdinand Marcos as President of the Republic of the Philippines. Under Philippine law, assets derived from misuse of public office are forfeit to the Republic from the moment they are generated (see ER 0102-1014), and the Republic accordingly set out to recover the vast sums stolen by Marcos during his 20-year tenure as President. As her first act in office, the Republic's new President, Corazon Aquino, created the Philippine Presidential Commission on Good Government (PCGG), which was given responsibility for locating and recapturing assets that had been wrongfully acquired by Marcos. Reclaiming assets misappropriated by Marcos was and is one of the Philippine government's most urgent priorities: the Republic recently sent a diplomatic note to the United States Department of State regarding this litigation, identifying the "recovery of [Marcos's] ill-gotten

wealth" as "a preeminent responsibility of the Philippine government" that "represents a national interest of the Republic that is of the highest order." App., *infra*, 65a.

The PCGG's mission took it to Switzerland, where Marcos had secreted much of his misappropriated property. At the PCGG's request, the Swiss government froze Marcos-related assets pending the outcome of civil and criminal proceedings against Marcos in the Philippines. Ultimately, because there was no reasonable doubt that Marcos had obtained his Swiss assets illegally, the Swiss Federal Supreme Court held in 1997 and 1998 that the assets should be transferred to an escrow account at the Philippine National Bank (PNB). See *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997).[1] The Swiss court conditioned these transfers on the Republic's guaranteeing that the eventual allocation of the assets would be made in accordance with the outcome of Philippine judicial proceedings between the Philippine government and the Marcos family estate. See *id.* at 10. The PCGG and PNB accordingly entered into escrow agreements obligating PNB to dispose of the repatriated property as directed by a final judgment of the appropriate Philippine court determining the assets' rightful owner.

In the Philippines, the PCGG in 1991 brought a forfeiture action regarding the Swiss assets before the Sandiganbayan, an anti-corruption court with exclusive jurisdiction to resolve issues relating to property allegedly pilfered by Marcos. Ct. App. ER 0106, 0174-0251. Marcos's widow, Imelda Marcos, and the Marcos estate have been fully represented in these proceedings. In 2000, the Sandiganbayan ruled for the

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[1] See also *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

PCGG, holding that the Swiss assets belong to the Philippines. The Sandiganbayan subsequently set aside its judgment on technical grounds, but the Philippine Supreme Court reversed, ruling in the PCGG's favor. *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003).

2. This case involves a dispute about ownership of a subset of the Marcos assets sent by Swiss authorities to be held in escrow by PNB. In 1972, Marcos created and transferred $2 million to Arelma, S.A., a Panamanian stock corporation with two outstanding shares that, prior to 1998, were held in Switzerland. Arelma invested the funds with Merrill Lynch, Pierce, Fenner & Smith, Inc., in New York, and by 2000 that investment had grown to approximately $35 million. Following the initial freeze of Marcos-related property in 1986, Swiss authorities identified Arelma as a repository for Marcos's assets; Swiss police officials subsequently included Arelma's share certificates among the assets transferred to PNB to be held in escrow pending final determination of ownership by the Philippine courts.[2]

When the PCGG brought its forfeiture action before the Sandiganbayan, it specifically listed Arelma and the Merrill Lynch account as the product of illegal activity that have at all times belonged to the Philippine government. ER 0106, 0174-0251. Although the Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding Marcos's Swiss property, it did not expressly mention the Arelma assets. The PCGG therefore filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law,

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[2] That transfer made PNB the sole shareholder of Arelma, with exclusive authority under Panamanian law to elect officers and directors and to determine the disposition of the corporation's assets.

is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. While the Marcos-related litigation was pending in the Philippine courts, the PCGG asked Merrill Lynch to surrender the Arelma assets to PNB, to be held in escrow pending final determination of ownership. Merrill Lynch declined to do so, "apparently because of the existence of other claimants" (App., *infra*, 31a) – most notably, a class of thousands of victims of the Marcos regime ("the Pimentel class") who had obtained a near-$2 billion judgment against the Marcos estate in the U.S. District Court for the District of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Evidently at the direction of Judge Real, the district judge who had presided over the Pimentel class action, Merrill Lynch ultimately initiated this interpleader suit in the District of Hawaii to resolve competing claims to the Arelma assets.[3] The named defendants in the action came to include the Republic; the PCGG; PNB; Arelma; Marcos heirs and others who assert a right to act for Arelma; and judgment creditors of the Marcos estate, among them the Pimentel class. See App., *infra*, 31a.

The Republic and the PCGG sought dismissal of the interpleader action. As a foreign sovereign and its instrumentality, they asserted sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. And invoking Federal Rule of Civil Procedure 19, they maintained that their unavailability required dismissal of the action. They were "necessary" parties to the suit within the

[3] Merrill Lynch initially stated that it would await the outcome of the Sandiganbayan proceedings before turning the Arelma assets over to anyone. ER0393-0395. When the Pimentel class asserted ownership of the assets, however, Judge Real directed Merrill Lynch to appear before him and instructed the firm to commence an interpleader proceeding not in New York, where Merrill Lynch is headquartered and where the funds were held, but in Hawaii. ER0031-ER0032.

meaning of Rule 19(a)(2), they argued, because adjudication of the interpleader action would impair their ability to protect their claim to the Arelma assets. And they were "indispensable" parties within the meaning of Rule 19(b), they continued, because resolution of the interpleader action effectively would render meaningless their assertion of immunity by resolving ownership of assets in which they had an interest. Accordingly, they concluded, the suit could not proceed in their absence. See App., *infra*, 31a-32a.

The district court disagreed. Rather than address the Republic's claim of sovereign immunity, the court effectively ruled against the Republic and the PCGG *on the merits*, holding that they were "not real parties in interest" in the interpleader action. See App., *infra*, 32a. Judge Real dismissed the Republic and the PCGG from the suit on that ground, held that they were neither necessary nor indispensable parties under Rule 19 because they had no enforceable claim to the Arelma assets, and enjoined them from bringing further actions in the United States to pursue the assets. See *id.* at 32a-33a. The Republic and the PCGG appealed.

The Ninth Circuit reversed. App., *infra*, 30a-42a. It held that since "the Republic and PCGG are immune from suit under the FSIA * * * the district court should have granted their motion to dismiss them on that ground." *Id.* at 39a. Given that immunity, the district court had no authority to inquire into the merits of their claim. Turning to Rule 19 and disposition of the interpleader action, the court determined that the Republic and the PCGG are "necessary" parties under Rule 19(a) who should participate in the action "if feasible" because they have a claim to the assets at issue in the litigation – a claim the court labeled "substantial." *Id.* at 41a. In addition, the Ninth Circuit noted that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence" under Rule 19(b). *Ibid.* Rather than dismiss the action outright, however, the court, with the con-

sent of the Republic and the PCGG, ordered that it be stayed pending resolution of litigation in the Philippines regarding ownership of the Arelma assets. *Id.* at 42a.

4. On remand, the district court promptly dissolved the stay. Judge Real ruled that the Republic and the PCGG, now absent from the litigation because they had been dismissed on sovereign immunity grounds, were not indispensable parties within the meaning of Rule 19(b). App., *infra*, 55a-60a. The court so held by, again, addressing the merits of the Republic's position, ruling this time that the Republic and the PCGG have "no legally protectible interest in the assets at issue in this proceeding" because any claim they brought for the Arelma funds held by Merrill Lynch in the United States would be time-barred. *Id.* at 57a. Without the participation of the Republic or PCGG, the court proceeded to adjudicate entitlement to the Arelma assets, awarding them in their entirety to the Pimentel class. *Id.* at 43a-54a.

5. The Ninth Circuit affirmed. App., *infra*, 1a-11a, 12a-20a, 21a-29a. In its initial opinion (*id.* at 21a-29a), the court began by opining that the indispensability test of Rule 19(b) is shaped by considerations of "fairness and the moral weighing that should attend the judge's choice of solutions." *Id.* at 25a. Applying this standard, the court reasoned that sovereign immunity is a "powerful consideration" in determining whether suit may go forward under Rule 19 in a sovereign's absence, but "is not the sole consideration." *Id.* at 26a.

Surveying the other factors that related to the "moral weighing" it believed relevant to the determination of indispensability, the Ninth Circuit noted that many years had gone by since the Arelma assets were placed in escrow and "the Republic has not obtained a judgment that the assets in dispute belong to it." Although the court did "not hold the Republic guilty of laches" – it hardly could have, as the PCGG has been diligently pursuing Marcos's assets around the world and in the Philippine courts throughout that period – the court regarded the Republic's "failure to secure a judg-

ment affecting these assets" as an equitable "factor to be taken into account." App., *infra*, 26a. The court also "note[d] the presence in this action of victims of the former president of the Republic," asking: "In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?" *Id.* at 27a. The court thought not. As a "final consideration," the court echoed Judge Real's view that resolution of the interpleader suit would not harm the Republic because the New York statute of limitations would bar any effort to obtain the Arelma assets from Merrill Lynch, so that, "[r]ealistically, we cannot envision a lawsuit in which the Republic will prevail." *Id.* at 28a. These considerations led the court to conclude that the Republic is not an indispensable party to the interpleader action.[4]

6. The Republic and the PCGG sought rehearing, arguing that "moral weighing" is not the standard established by Rule 19(b). In response, the panel withdrew its opinion and substituted a new one. App., *infra*, 1a-11a. The revised decision removed the reference to "moral weighing" and was restructured to address directly the criteria identified in Rule 19(b), but it substantially incorporated the reasoning of the initial decision. It thus reaffirmed the holding that the Republic and the PCGG are not indispensable parties, and it awarded the Arelma assets to the Pimentel class.

Accepting that the Republic and the PCGG are "necessary" parties under Rule 19(a) (App., *infra*, 5a), the Ninth Circuit began with the term "equity and good conscience," which is part of the Rule 19(b) test. The court opined that, "in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and 'good

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[4] Several days later, the court of appeals issued a revised opinion that was amended in ways that are not material here. App., *infra*, 12a-20a.

conscience' referred to an interior moral arbiter regarded as the voice of God." App., *infra*, 6a. The court concluded that the terms had more recently been "domesticated" and taken on "a secular rather than a religious cast," but nevertheless believed that their use in Rule 19 "emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions." *Ibid.*

The Ninth Circuit then turned to the considerations identified in the text of Rule 19(b) as relevant to the indispensability inquiry. Although the court reiterated that sovereign immunity generally is a "powerful consideration," it found the Republic's immunity entitled to no weight in this case because, "[t]o protect a party as indispensable, Rule 19 requires an interest that will be impaired by the litigation as a practical matter." App. *infra*, 7a (citation and internal quotation marks omitted). The court believed that the Republic had no such interest here because, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Ibid.* That is so, the court reasoned, because an action by the Republic to recover the assets held by Merrill Lynch in the United States would be time-barred. *Id.* at 8a. The court thought it immaterial that claims brought by the Republic in the Philippine courts seeking recapture of assets stolen by Marcos are *not* subject to a statute of limitations, reasoning that "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect." *Ibid.*

For similar reasons, the Ninth Circuit found it irrelevant that the district court's judgment did not contain provisions designed to protect the Republic's interest; "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." App., *infra*, 9a. The court also reasoned that a judgment for the Pimentel class issued in the Republic's absence would be

"adequate" because "the symbolic significance of some tangible recovery [for the class] is not to be disregarded." *Ibid.* The court was not persuaded by the argument that Marcos's victims "should find redress from their own government" because, it believed, "the Republic has not taken steps to compensate those persons who suffered outrage from the extralegal acts of a man who was President of the Republic." *Id.* at 9a-10a. The court also stated that the Pimentel class has "no forum within the Philippines open to their claims." *Id.* at 10a.

In holding that the Republic and the PCGG are not indispensable and affirming the judgment for the Pimentel class, the Ninth Circuit recognized that the Arelma "assets may be distributed after judgment here and be beyond recapture," so that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." App., *infra*, 8a-9a. But the court did not regard that reality as relevant because it believed that the Republic's legal claim to the assets ultimately would not be successful. Thus, the court concluded, "[n]o injustice is done if [the Republic] now loses what it can never effectually possess." *Id.* at 10a.

The court of appeals subsequently denied a renewed petition for rehearing filed by the Republic. In doing so, it reiterated its view that that the Republic could not enforce a Philippine judgment awarding it the Arelma assets because "[t]he Republic has no jurisdiction over the *rem* [*sic*], which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States." App., *infra*, 61a. The Ninth Circuit also restated its view that suit may proceed under Rule 19(b) even in the absence of a necessary party that asserts sovereign immunity. The court recognized that "'some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b).'" But the Ninth Circuit rejected that approach, instead "'follow[ing] the four-factor process even with immune [entities].'" *Id.* at 61a-62a (citation omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision went badly astray on several levels. Its holding that litigation over the ownership of assets claimed by a sovereign may proceed to judgment in the sovereign's absence eviscerates the sovereign immunity doctrine and substantially undercuts the important public interests served by the immunity principle. The court compounded its error by basing its ruling on a finding that the sovereign's claim lacks merit, the very sort of determination that sovereign immunity is meant to foreclose. And the decision below also departed more broadly from proper application of the Rule 19(b) standards, misstating the requirements of the Rule and producing a conflict in the lower courts on a recurring issue of considerable significance.

Perhaps most fundamentally, the court of appeals' holding effectively precludes the Republic from recovering assets stolen by its former President, short-circuiting litigation now pending in the Philippine courts and interfering with one of the Republic's essential interests. This aspect of the Ninth Circuit's ruling threatens to disrupt international cooperation in combating official corruption, may prompt retaliation by foreign governments or make foreign tribunals reluctant to enforce the judgments of United States courts, and – not least – will cause substantial friction in the United States' relationship with an important ally.[5] The judgment below accordingly should not stand.

A. The Decision Below Undermines Important Principles Of Sovereign Immunity And Departs From The Standards That Govern Rule 19(b)

The framework for resolution of this case is set by Fed.

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[5] The decision also places PNB, the nominal owner of Arelma, in an untenable position because the bank is a party to escrow agreements, entered into at the direction of the Swiss Federal Supreme Court, requiring it to dispose of the Arelma assets as directed by the appropriate *Philippine* court.

R. Civ. P. 19. Under Rule 19(a)(2)(i), an entity must be joined to an action as a party – in common parlance, the entity is a "necessary" party – if it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." As the Ninth Circuit itself recognized, the Republic and the PCGG plainly satisfy that test. App., *infra*, 5a, 40a.

The crux of the legal issue here is found at the next step of the inquiry, in Rule 19(b). That element of the Rule provides that, if an entity described in Rule 19(a) cannot be made a party – which the Ninth Circuit again agreed is the case here, given the sovereign immunity of the Republic and the PCGG – "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Rule offers four nonexclusive factors that may be considered in guiding this decision: (1) "to what extent a judgment issued in the person's absence might be prejudicial to the person"; (2) the extent to which, by use of protective provisions in the judgment, "the prejudice can be lessened or avoided"; (3) "whether a judgment rendered in the person's absence will be adequate"; and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Under this regime, a party is labeled "indispensable" once the court concludes that the case should not proceed in the party's absence. As Justice Harlan explained for a unanimous Court in the leading decision on Rule 19(b):

> [t]he decision whether to dismiss (*i.e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it

> merely commands the courts to examine each controversy to make certain that the interests really exist.

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102, 118-119 (1968). For several reasons, the Ninth Circuit's application of these principles was fundamentally flawed.

1. A Case Must Be Dismissed Under Rule 19(b) When A Necessary Party Has Sovereign Immunity

a. To begin with, the Ninth Circuit departed from principles regarded as fundamental by this Court when it failed to recognize that the sovereign immunity of a "necessary" party is one of those "substantive" factors that are "compelling by themselves" (*Provident*, 390 U.S. at 118-119) and that, without more, *require* dismissal of the action under Rule 19(b). Since Revolutionary times, it has been thought "'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind.'" *Fed. Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting *The Federalist*, No. 81, at 487-488 (C. Rossiter ed. 1961) (Hamilton) (emphasis in original)). So far as foreign sovereigns are concerned, that principle was recognized "very early in our history" and "has since become part of the fabric of our law" (*Nat'l City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955)), established first by this Court as a matter of common law (see *Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812)) and subsequently codified in the FSIA.

It has long been the position of the United States that immunity in domestic courts for foreign sovereigns serves interests of substantial public importance: "'the purpose of sovereign immunity in modern international law ... is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based on its public acts.'" *Segni* v. *Commercial Office of*

Spain, 816 F.2d 344, 347 (7th Cir. 1987) (Posner, J.) (quoting testimony of State Department Legal Advisor)) (ellipses added by the court). Such immunity is provided as a "gesture of comity between the United States and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688-689 (2004); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). Where it applies, immunity both spares the sovereign's treasury and altogether protects it against the burden of having to engage in litigation. See, *e.g.*, *Fed. Maritime Comm'n*, 535 U.S. at 765-766.

b. As a practical matter, allowing litigation to proceed in the absence of a sovereign that claims immunity, when the sovereign is a "necessary" party under Rule 19(a), wholly vitiates that immunity. That certainly is true in the interpleader context. Interpleader actions, after all, are intended to settle definitively competing and incompatible claims to property, such as those relating to the Arelma assets at issue in this case. The Ninth Circuit itself candidly acknowledged that the litigation here will accomplish precisely that result, recognizing that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." App., *infra*, 9a. That outcome would make the Republic's assertion of immunity meaningless and wholly frustrate the compelling interests served by the immunity doctrine. See, *e.g. Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (suit adjudicating sovereign's interest in a contract in the sovereign's absence would "effectively abrogate * * * sovereign immunity").

Allowing such a judgment to issue would do more than award to private litigants assets that are claimed by a sovereign; it also would effectively coerce the sovereign into formally surrendering its immunity and appearing in court so that it is able to defend interests that otherwise would simply be overborne without its participation. This Court made just that point in very similar circumstances in *Federal Maritime*

Commission, explaining that, when a proceeding will have the same practical effect as a judgment against a sovereign, the sovereign either "would effectively be required to defend [itself]" or would "substantially compromise its ability to defend itself at all." *Fed. Maritime Comm'n*, 535 U.S. at 762. To believe that this sort of choice does not "coerce" a sovereign into participating in litigation and waiving immunity, the Court concluded, "would be to blind ourselves to reality." *Id.* at 763-764.

Entertaining an action in the absence of a necessary party that has asserted sovereign immunity therefore is inconsistent with the immunity doctrine. In circumstances like those here, a judgment awarding assets claimed by a sovereign has the same effect on the sovereign's treasury as would a suit in which the sovereign is compelled to appear. And in the international context, awarding assets claimed by another nation to private parties, as the result of litigation in which that nation did not participate, destroys the "grace and comity" that underlies the immunity principle. After all, "[i]t is wholly at odds with the policy of [sovereign immunity] to put the [sovereign] to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

c. For just these reasons, this Court has held that a sovereign is an "indispensable" party in a suit – like this one – that "is essentially one designed to reach money which the government owns." *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945) (quoting *Louisiana* v. *Garfield*, 211 U.S. 70, 78 (1908)). Such a suit must be dismissed when the sovereign claims immunity because "the government's liability cannot be tried 'behind its back.'" *Ibid.* See *Minnesota* v. *United States*, 305 U.S. 382, 383-384 (1939) (suit to condemn land in which United States claims an interest must be dismissed when United States asserts immunity); 7 Wright, Miller, & Kane, *Federal Practice & Procedure 3d* § 1617 &

n.10 (citing *Forrestal* and *Minnesota* for proposition that, "[w]hen an interest of the federal government is involved in a suit and a judgment cannot be rendered without affecting that interest," "the United States may be regarded as an indispensable party under Rule 19 and the action dismissed").[6]

These holdings were compelled by the significance of the interests served by sovereign immunity. The importance of the immunity principle means that, "when an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those factors compelling by themselves." *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotation marks omitted). Cf. *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940) (cross-claim against sovereign prohibited because "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."). In this context, requiring dismissal of a suit to preserve a foreign nation's sovereign immunity is not at all inconsistent with Rule 19(b)'s standards of "equity and good conscience"; to the contrary, the foreign sovereign immunity doctrine *itself* "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank*, 348 U.S. at 362. The decision below cannot be squared with this understanding.

d. For its part, the Ninth Circuit did acknowledge that, "[i]n the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action." App., *infra*, 6a. Notwithstanding that proposition, however, the court immediately proceeded to conclude that, "under

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[6] Although these decisions predated Rule 19(b), the governing joinder law at the time was substantially identical to that now stated in the Rule. See *Provident*, 390 U.S. at 116 n.12 ("The new text of the Rule was not intended as a change in principles.").

Rule 19, sovereign immunity is *not* the sole consideration." *Id.* at 7a (emphasis added). For reasons we have explained, that conclusion was wrong. And the court of appeals greatly compounded its error in the remainder of its analysis: one of its principal bases for disregarding the Republic's immunity was its conclusion that the Republic's claim to the Arelma assets would fail *on the merits* if litigated. That reasoning endorsed an approach that effectively *adjudicates a claim against the sovereign* as a means of determining whether the sovereign's absence from the suit requires dismissal.

This approach rests on a basic misunderstanding of sovereign immunity. The doctrine precludes compelling a sovereign to litigate its interest in disputed assets; it surely also precludes a court from *itself* assessing the strength of the sovereign's claim in the sovereign's absence and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits. In fact, resolving the Rule 19(b) inquiry by looking at the merits of the sovereign's case actually increases the pressure on the sovereign to appear in court and participate in the litigation. The sovereign "obviously will not know *ex ante*" how the court will assess the strength of the sovereign's claim on the merits. *Fed. Maritime Comm'n*, 535 U.S. at 764 n.17. An unfavorable determination could substantially undermine the sovereign's interests by, for example, limiting the sovereign's ability to litigate the issue (or related issues) in another forum even if that otherwise would have been a possibility. That reality would "coerce[] [the sovereign] to participate in [the] proceedings" for fear that, if it fails to do so, "it will have all but lost any opportunity to defend itself." *Ibid.*

The perverse effect of the Ninth Circuit's approach is reflected by what happened in this case: the only consequence of the Republic's and the PCGG's invoking their immunity was that they were not present to protect themselves when their interests were determined. Needless to say, litigation about the merits of an absent party's claim, which will pro-

ceed without a full adversary presentation on the issues, may well come to the wrong conclusion. That happened here: the Ninth Circuit was incorrect in its belief that a Philippine judgment awarding the Arelma assets to the Republic would be unenforceable in the United States.[7] Moreover, permitting the case to proceed in the sovereign's absence denies the sovereign an opportunity to fully litigate other grounds on which dismissal might be appropriate. In this case, for example, there were powerful arguments that the suit should have been dismissed on grounds of comity, act of state, or forum non conveniens, all of which were ignored by the courts below.[8] For this reason as well, a court's non-litigated assess-

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[7] The Ninth Circuit reasoned that the Philippine courts regard the action here as one *in rem*, that the Republic has no jurisdiction over the *res*, and that "any judgment made without proper jurisdiction is unenforceable in the United States." App., *infra*, 61a. In fact, the Philippine Supreme Court, in the very decision relied upon by the Ninth Circuit, indicated that the corporations used to shield Marcos' assets are *themselves* "the *res*" (*Rep. of the Phil. v. Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003), at 50 – making *the Arelma shares*, which are being held by PNB in the Philippines, the *res* at issue here. Moreover, the Philippine Supreme Court also declared that it *did* have jurisdiction over funds transferred from Switzerland. *Rep. of the Phil. v. Honorable Sandiganbayan*, G.R. No. 152154 (Phil. Nov. 18 2003), at 11 ("We take judicial notice of newspaper accounts that a certain Judge Manuel Real of the US District Court of Hawaii issued a 'global freeze order' on the Marcos assets, including the Swiss deposits. We reject this order outrightly because it is a transgression not only of the principle of territoriality in public international law but also of the jurisdiction of this Court recognized by the parties-in-interest and the Swiss government itself."). And when enforcing foreign judgments, courts in the United States (with limited exceptions not relevant here) assume subject matter jurisdiction. *Restatement (Third) of Foreign Relations Law* § 482 cmt a, cmt d (1987).

[8] The Republic and the PCGG raised each of those grounds in the district court and noted them in their briefing to the Ninth Circuit.

ment of the merits is not an adequate substitute for dismissal of the action on the basis of sovereign immunity. The Ninth Circuit's contrary conclusion should be set aside.

2. *The Ninth Circuit's Ruling Conflicts With The Decisions Of Other Courts Of Appeals, Which Have Held That A Sovereign Asserting Immunity Is An Indispensable Party Under Rule 19(b)*

Given the Ninth Circuit's departure from principles announced by this Court, it is not surprising that the holding below conflicts with the decisions of other courts of appeals. Indeed, the Ninth Circuit's denial of rehearing in this case itself candidly acknowledged that conflict: "'some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune [entities]." App., *infra*, 61a-62a (citation omitted). See *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (citations and internal quotation marks omitted) (although "[c]ognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four-part balancing test to determine whether [sovereigns] are indispensable parties."). In this, at least, the Ninth Circuit was correct: its holding departs from that of other courts of appeals.

In a decision issued shortly after Rule 19 took effect, for example, the First Circuit addressed a suit seeking funds owed to the United States. Writing for the court, Judge Coffin explained that "[a] judgment for the appellant would necessarily be based on a holding that the United States had no right in the fund. Thus, the United States is an indispensable

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CA9 Br. 44-46. As non-participants in the underlying action following the Ninth Circuit's recognition of their immunity in the original appeal, however, they did not have an opportunity to address the issues in any detail.

party to the action. * * * Since the United States is not and cannot be joined as a defendant, the action cannot proceed." *Am. Guaranty Corp.* v. *Burton*, 380 F.2d 789, 791 (1st Cir. 1967). The court saw no need to consider the Rule 19(b) balancing test.

The Second Circuit likewise held tribal immunity dispositive in *Fluent*. The court found "very little room for balancing of other factors set out in [r]ule 19(b), because immunity may be viewed as one of those interests compelling by themselves." 928 F.2d at 548 (citations and internal quotation marks omitted; brackets added by the court). The court added that "[t]he rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [sovereigns] from suit without * * * consent.'" *Ibid.* (quoting *Wichita*, 788 F.2d at 777). The existence of sovereign immunity thus made it unnecessary for the court to balance the Rule 19(b) factors. See also *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48-49 (2d Cir. 2004) (finding state indispensable under Rule 19(b) "in light of the significance sovereign immunity plays in weighing the Rule 19(b) factors").

The District of Columbia Circuit took a similar approach in *Wichita & Affiliated Tribes*, where a sovereign Indian tribe was a necessary party. The court there did look at each of the Rule 19(b) factors. See 788 F.2d at 774-778. But it found the balance tipped decisively in favor of a finding of indispensability by the Tribe's immunity. The court concluded that the Tribe's ability to intervene in the action could not be treated as diminishing prejudice to it because that "would be wholly at odds with the policy of tribal immunity." *Id.* at 776. It held that provisions in the judgment limiting relief could not be thought to guard against prejudice when those provisions would "allow tribal immunity to be avoided." *Ibid.* And the court concluded that, although other parties would not have

an adequate alternative remedy if the suit were dismissed, that "result is less troublesome in this case than in some others" because "[t]he dismissal of this suit is mandated by the policy of tribal immunity." *Id.* at 777.

Other courts of appeals, to be sure, have reasoned that balancing of the Rule 19(b) factors cannot be "completely avoided simply because an absent person is immune from suit." *Davis* v. *United States*, 343 F.3d 1282, 1293 (10th Cir. 2003). But for the most part, even these courts have recognized that sovereign immunity requires conducting the balance with a thumb on the scale favoring indispensability of the sovereign party. See *id.* at 1293-1294 ("the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit"); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) (same).[9] And *no* court – other than the Ninth Circuit in this case – has found it appropriate to assess the strength of the sovereign's argument on the merits in determining whether the sovereign is an indispensable party. Because the holding below accordingly creates confusion about an important and recurring question, further review is warranted.

3. The Ninth Circuit's Understanding Of The Rule 19(b) Factors Cannot Be Reconciled With The Holdings Of This Court And Other Courts Of Appeals

Review also is warranted for another reason: wholly apart from its misunderstanding of the relationship between

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[9] Some courts of appeals have applied the Rule 19(b) factors without stating that sovereign immunity is entitled to special weight, but they nevertheless have held the immune parties to be indispensable. See, *e.g.*, *Yashenko* v. *Harrah's NC Casino Co.*, 446 F.3d 541, 552-553 (4th Cir. 2006); *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347-1348 (6th Cir. 1993).

sovereign immunity and Rule 19(b), the holding below misconstrued the four equitable factors specified in the Rule as bearing on indispensability. Even assuming that a balancing of the Rule 19(b) factors could be appropriate in this case, the Ninth Circuit's reading of the Rule confuses the law in material respects, departing significantly from the approach taken by this Court and other courts of appeals.

First, Rule 19(b) indicates that "the court must consider the extent to which the judgment may 'as a practical matter impair or impede [the absent party's] ability to protect' his interest in the subject matter." *Provident*, 390 U.S. at 110. There is no doubt that the Republic's and the PCGG's interest in the Arelma assets was substantially (indeed, entirely) impaired by the interpleader proceeding; the Ninth Circuit did not suggest otherwise. See 4 *Moore's Federal Practice*, § 19.05[2][d], at 19-23 (3d ed. 2006) (where there are inconsistent claims to the same assets, "prejudice from nonjoinder is virtually inescapable").

The Ninth Circuit nevertheless held that this consideration did not favor dismissal because the Republic's claim to the assets could not prevail on the merits. App., *infra*, 8a-9a. But that approach to the first Rule 19(b) factor has been flatly rejected by other courts of appeals, which have held (wholly apart from the sovereign immunity considerations discussed above) that the strength of the absent party's claim on the merits may *not* be considered under the first Rule 19(b) factor. As the Tenth Circuit put it, criticizing precisely the analysis used by the Ninth Circuit here, such an approach

> amounts to asking us to decide that the [absent party's] "interest" is not worthy of consideration because its position is wrong on the merits. But Rule 19's concern is with a "*claimed* interest." * * * "[T]he underlying merits of the litigation are irrelevant" to a Rule 19 inquiry, at least unless the claimed interest is "perfectly frivolous."

Davis, 343 F.3d at 1291 (citation omitted) (emphasis in

original). See *Tankersley* v. *Albright*, 514 F.2d 956, 965-966 (7th Cir. 1975) (inquiry "must be * * * determined prior to any consideration of the merits"). Here, the Republic's claim could not be thought "perfectly frivolous"; the Ninth Circuit itself characterized the claim as "substantial." App., *infra*, 40a. The Ninth Circuit's approach accordingly conflicts directly with that of the Tenth Circuit.

Second, Rule 19(b) directs the court to ask whether the judgment can "'be written so as to protect the legitimate interests of outsiders.'" *Provident*, 390 U.S. at 112 n.10. That plainly is impossible in a case like this, where all parties are claiming 100 percent of the same funds. See, *e.g.*, *Hall*, 100 F.3d at 480 (where all claim the same assets, there is "no way that [the court] might shape relief to lessen the potential prejudice to the [absent party]"). Again, the Ninth Circuit disregarded this consideration on the theory that, "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." App., *infra*, 9a. But that analysis is just as wrong here as it is in relation to the first Rule 19(b) factor. As the Tenth Circuit explained, the sort of approach taken by the Ninth Circuit here is improper because "this argument goes to the merits of [the absent party's] claim, rather than the potential harm to the [absent party]" that would be caused by an unfavorable judgment. *Davis*, 343 F.3d at 1292.

Third, the Ninth Circuit found the judgment here "adequate" because, although the Arelma assets would not satisfy the Pimentel class's entire $2 billion judgment, "the symbolic significance of some tangible recovery is not to be disregarded" and pro rata distribution of the assets to the class "will have monetary meaning for the poor among them." App., *infra*, 9a. But this reasoning misunderstands the Rule 19(b) "adequacy" consideration. The Rule does not look to whether the judgment adequately compensates the plaintiffs, as the Ninth Circuit believed. Instead, this Court "read[s] the Rule's third criterion, whether the judgment issued in the ab-

sence of the nonjoined party will be 'adequate,' to refer to th[e] public stake in settling disputes by wholes, whenever possible." *Provident*, 390 U.S. at 111. Other courts of appeals have faithfully followed that guidance, looking to whether judgment in the action will dispose of *all* interests in the dispute. As the Tenth Circuit put it, "[t]he Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view. * * * Rather, the factor is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1292-1293.

The judgment here cannot satisfy the standard articulated in *Provident*. It wholly discounts the interests of the Republic and the PCGG. And it does not satisfy "th[e] public stake in settling disputes by wholes"; as the Ninth Circuit itself acknowledged, "Merrill Lynch risks being sued again" by claimants to the assets who did not participate in the litigation. App., *infra*, 10a.

At least three of the four Rule 19(b) factors therefore decisively favor dismissal of this action.[10] The Ninth Circuit's contrary decision turned on legal errors and the application of aberrant standards that have been rejected by other courts of appeals; had this case been litigated outside the Ninth Circuit, the Republic and the PCGG would have prevailed. Review by this Court is needed to bring uniformity to this important area of the law.

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[10] The fourth Rule 19(b) factor, which looks to the availability of an alternative Philippine remedy for the Pimentel class, points the same way. The dispute in the Philippines is between the Republic and the Marcos estate over ownership of the Arelma assets. The Pimentel class asserts its claim to those assets only as a creditor of the estate. It accordingly has no role to play in the litigation until the precedent question of ownership is settled as between the Republic and the estate. Questions regarding availability of a remedy for the class therefore should not arise until *after* resolution of the ongoing Philippine litigation.

B. The Decision Below Threatens To Undermine International Cooperation In Combating Official Corruption And Cause Friction In The United States' Relationship With An Important Ally

1. The Rule 19(b) issues presented here – concerning the proper treatment of sovereign immunity and the nature of the more general equitable considerations identified in the Rule – are recurring ones of substantial practical importance. Cases arising under Rule 19 tend to be significant, addressing the interests of multiple parties and absentees. See generally 4 *Moore's Federal Practice*, at § 19.02[1]. And almost by definition, disputes involving the rights of absent sovereigns concern matters of great public significance. For these reasons alone, a grant of certiorari is warranted to address the Ninth Circuit's departure from principles articulated by this Court and other courts of appeals.

There is much more to this case, however, than the technical nature of the Ninth Circuit's legal error. The need for this Court's intervention is especially acute because of the context in which this case arises: the legal rule formulated by the court of appeals, which effectively permits adjudication of the interests of nonconsenting foreign sovereigns by United States courts, inevitably will cause friction in the United States' relations with other countries. It also threatens to interfere with important international efforts to enforce criminal and civil laws combating official corruption, a matter of deep concern to the United States.[11]

The specific holding in this case, moreover, touches on a

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[11] The United States is a signatory to the United Nations Convention Against Corruption, Oct. 31, 2003, GA Res. 58/4, which makes the "return of [stolen] assets * * * a fundamental principle" (Art. 51) and obligates a state party to the Convention to "[t]ake such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party." Art. 54(1)(a).

matter of the greatest importance and sensitivity to the Philippines. In fact, it is difficult to imagine a case in which the Republic could have a more profound interest in resolution of the matter by its own courts. The Ninth Circuit interjected itself into a dispute between the Republic and its former President, over the ownership of assets stolen from the Republic during that President's tenure in office, and that also involves claims made by Philippine citizens arising out of injuries they suffered in the Philippines at the hands of the former President. As the Republic recently communicated to the State Department in a diplomatic note, the decision below, by frustrating the Philippine interest in domestic resolution of this dispute, addresses "a subject of the highest importance in maintaining respectful relations among nations." App., *infra*, 66a. Further review therefore is imperative.

2. As a general matter, there is no doubt that United States judicial decisions impinging on the interests of other nations raise matters of the greatest political sensitivity and importance. See, *e.g.*, *Verlinden*, 461 U.S. at 489. Judicial "seizure of the property of a friendly state," for example – an action that is closely analogous to the proceeding here, in which United States courts propose to distribute to third parties assets claimed by the Republic and the PCGG – "may be regarded as * * * an affront to [that state's] dignity and may * * * affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). The FSIA was directed at just these sorts of concerns. See, *e.g.*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., at 27 (1976) (attachment of foreign government assets "can give rise to serious friction in the United States' foreign relations" and cause "significant irritation to many foreign governments").

This case graphically illustrates the problems that may arise when United States courts adjudicate the interests of foreign sovereigns without their consent. The dispute here concerns the ownership of assets claimed by the Republic that were stolen in the Philippines by its former President.

Paramount national policy of the Republic makes recovery of those assets a matter of the greatest urgency.[12] In pursuit of that policy, the Republic and the PCGG sought and obtained the assistance of the Swiss government, achieving return of the Arelma shares to the Philippines. The Republic and the PCGG have sought to settle ownership of the Arelma assets through the Philippine court established for that purpose, litigating for more than ten years against the former President's estate; the decision of the Philippine courts in that pending litigation will determine ownership of the assets as a matter of Philippine law. Moreover, the competing claimants to the Arelma assets in the Ninth Circuit proceeding are virtually all citizens of the Philippines, which also makes *this* dispute one between the Republic and its citizens.

Against this background, the interference with the sovereign interests of the Philippines that is worked by the Ninth Circuit's judgment, as well as the likelihood that the judgment will cause significant friction in the United States' relationship with the Republic, is obvious. As a practical matter, the decision below frustrates Philippine policy regarding the recovery of misappropriated state assets. And it effectively pretermits ongoing litigation in the Philippine courts between the Republic and the estate of its former President.

Perhaps most extraordinarily, the Ninth Circuit's ruling rubs salt in the wound by relying, in part, on an express disapproval of Philippine executive and legislative policy. As one of the "equitable" considerations supporting its decision, the Ninth Circuit complained that "the Republic has not

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[12] See, *e.g.*, Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) ("vast resources of the government have been amassed by former President Ferdinand E. Marcos" and "there is an urgent need to recover all ill-gotten wealth"); Phil. Exec. Order No. 14 (May 7, 1986) (Pres. Corazon Aquino) ("the vital task of [the PCGG] involves the just and expeditious recovery of * * * ill-gotten wealth in order that the funds, assets, and other properties may be used to hasten national economic recovery").

taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was president of the Republic." App., *infra* 9a-10a. Few things are more likely to cause irritation to a foreign government than an adverse judicial decision premised on a United States court's disagreement with that government's democratically implemented domestic policy.[13]

3. The Ninth Circuit's holding also frustrates policies of the Swiss government. The Swiss Federal Supreme Court authorized transfer of the Arelma shares to be held in escrow by PNB on the express condition that "[t]he *Republic of the Philippines* guarantee to decide about the seizure or restitution of the assets to the entitled parties, respectively, in judicial proceedings which satisfy [certain] procedural principles." *Fed. Office*, *supra*, at 10 (emphasis added). That determination "must be taken *in the Philippines* where the criminal actions were committed." *Republic of the Phil.*, *supra*, at 217 (emphasis added). In reaching this conclusion, the Swiss Federal Supreme Court specifically addressed the claims of the human rights plaintiffs in the *Hilao* litigation, finding that those plaintiffs were not entitled to attach assets held by Marcos in Switzerland. Instead, the Swiss court reasoned that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim

[13] In fact, while the court of appeals erred by taking Philippine policy into account at all, the Ninth Circuit also was wrong in its view that the Philippine government has been indifferent to the suffering of persons injured by the Marcos administration. A bicameral committee of both Houses of the Philippine Congress recently approved a compromise bill to provide substantial compensation to human rights claimants, after similar bills passed both Houses. See Phil. Senate bill No. 1745; Phil. House bill No. 3315. That compromise bill is likely to be enacted into law shortly.

damages from the Philippine government for the wrongs committed by its organs." *Fed. Office*, *supra*, at 28. Were that not the case, the court concluded, "individual creditors [could] prevent mutual assistance measures of Switzerland by appealing to American courts." *Id.* at 33. Decisions like the one below, however, do precisely that, interfering with international processes for combating official corruption and discouraging foreign tribunals from assisting American courts in the repatriation of stolen assets.

Indeed, those same concerns prompted the United States to file a brief in the Ninth Circuit seeking reversal of an earlier decision issued by the same district judge who presided in this case, arising out of an earlier round of litigation regarding entitlement to assets stolen by Marcos. Br. for the United States as Amicus Curiae, *Hilao* v. *Marcos*, 103 F.3d 789 (9th Cir. 1996) (No. 95-16779), 1996 WL 3418836. The issues in that case were similar in substantial respects to those here. As in this case, where Judge Real directed Merrill Lynch to transfer the Arelma assets to Hawaii and commence an interpleader action there, in *Hilao* Judge Real directed two Swiss banks to transfer frozen Marcos-related assets to Hawaii so that he could conduct an interpleader action to determine whether those assets should be awarded to human rights plaintiffs. See *id.* at *3-*6. As here, the "basic issue in the case [was] whether assets of the Marcos Estate * * * should be distributed to the Philippine Government or to its citizens." *Id.* at *10.

Supporting the banks' appeal, the United States explained that the district court's attempt to interplead the assets "undermines important interests of Switzerland and the Philippines and threatens to discourage international cooperation in matters affecting criminal law enforcement." 1996 WL 3418836, at *2. Pointing to the freeze orders entered by Swiss authorities, the United States noted that, "[i]f our courts do not respect the valid orders entered by other nations, the courts in other countries cannot be expected to

honor orders entered in other countries for our benefit, or orders issued by the United States." *Id.* at *14. The United States also explained that the district court's approach "undermined significant interests" of the Philippines, "which has a strong interest in ensuring that its criminal laws are enforced, and that is particularly true with respect to the serious misappropriation and public corruption charges filed against the Marcoses." *Id.* at 15.[14] These same concerns have obvious currency in this case, where adjudication of entitlement to the Arelma assets by United States courts undermines application of Philippine anti-corruption law, interferes with the Republic's legitimate attempt to recover stolen assets, and is inconsistent with the Swiss Federal Supreme Court's transfer of the Arelma shares to the Philippines.

To the extent that there is doubt about this, it would be appropriate for the Court to invite the United States to submit its views on the question. See *Altmann*, 541 U.S. at 701-702 (State Department views "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). We submit, however, that there should be no doubt about the proper outcome here. The legal and foreign policy implications of the holding below are profound. If the interests of a close ally of the United States are to be impaired – and the law as it relates both to sovereign immunity and to Rule 19(b) is to be modified – it should be this Court, rather than the Ninth Circuit, that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] Responding to those concerns, the Ninth Circuit set aside the district court's order in that case. *Hilao* v. *Estate of Marcos*, 95 F.3d 848 (9th Cir. 1996).

Respectfully submitted.

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MARCH 2007

APPENDIX

APPENDIX A

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed Sept. 12, 2006.

Before JOHN T. NOONAN, SIDNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER

NOONAN, Circuit Judge.

The opinion filed May 4, 2006, and amended May 9, 2006, is hereby WITHDRAWN. An amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the panel has voted to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Noonan and Judge Robart so recommend.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is DENIED, and the petition for rehearing en banc is DENIED.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimentel (Pimentel). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Federal Rule of Civil Procedure 19(b). We affirm the judgment of the district court.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000, by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Phil.*, 309 F.3d 1143, 1149-52 (9th Cir.2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Rep. Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the*

Phil., 309 F.3d at 1153.

Pimentel is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas's judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Federal Rule of Civil Procedure 19. The first section of the rule speaks of "persons needed for just adjudication." Fed. R. Civ. P. 19. The Republic falls within this section because, as the rule puts the matter, the Republic

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.

Fed. R. Civ. P. 19(a)(2). Such a party should be joined to the action.

The rule goes on to prescribe what a court should do "whenever joinder is not feasible." Fed. R. Civ. P. 19. In such a case,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Indispensability "can only be determined in the context of particular litigation." *Provident*

Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself, viewed through the lens of "equity and good conscience." *Id.* at 109, 88 S.Ct. 733.

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said:

> the district court ... held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion.

Merrill Lynch v. *Pimental*, [sic] Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb.20, 2004) (per curiam). Pimentel argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

Accordingly, we must apply the factors set forth in Rule 19(b), in "the context of [this] particular litigation." *Provident Bank*, 390 U.S. at 118, 88 S.Ct. 733. The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court.

See Elmendorf v. *Taylor*, 10 Wheat. 152, 23 U.S. 152, 181, 6 L.Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

Prejudice to the Republic

First, we must consider whether a judgment rendered in the absence of the Republic "might be prejudicial to [it] or to those already parties." Fed. R. Civ. P. 19(b). Following the example of the Supreme Court in conducting this analysis, *see Provident Bank* at 115-16, 88 S.Ct. 733, we consider the circumstances and practicalities of the Republic's claim.

The general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990), we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond a three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want

of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000), a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under Rule 19, it is not the sole consideration.

The Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account. *See Provident Bank*, 390 U.S. at 115, 88 S.Ct. 733.

To protect a party as indispensable, Rule 19 requires "an 'interest' that will be impaired by the litigation 'as a practical matter.'" *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1023 (9th Cir.2002). As a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets. The res is in the United States. It cannot be fi-

nally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving the assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now.

Scenario one: We dismiss this action. Pimentel sues Merrill Lynch in New York for the assets. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. *See* N.Y. C.P.L.R. § 213. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Pimentel takes the assets to the extent of his judgment. Scenario two: The plaintiff is the Republic. The Republic is time-barred. Pimentel intervenes and obtains the assets.

The Republic insists that it could obtain a judgment regarding the ownership of these assets in the Philippines, where it is relieved of any statute of limitations. But a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect. *See Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir.1985); *see also* Restatement (Third) of the Foreign Relations Law of the U.S. § 482(2)(a) (1987).

Finally, we note that any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed,

the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *Int'l Harvester Co.*, 668 F.2d 142, 147 (2d Cir.1981); N.Y. C.P.L.R. § 213 (misappropriation of public property). Tolling by Marcos's time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

The Possibility of Protective Provisions

Rule 19(b) requires us to assess the opportunity for the court to use "protective provisions in the judgment" by which "the prejudice" to the absent party "can be lessened or avoided." Fed. R. Civ. P. 19(b). Because the Republic has little practical likelihood of obtaining the Arelma asserts, there is no need to lessen prejudice to it.

Adequacy of Judgment and Availability of Alternative Forums

Under Rule 19(b), we are charged with determining whether "a judgment rendered in [the Republic's] absence will be adequate" and "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R. Civ. P. 19(b). We note the presence in this action of victims of the former president of the Republic. The class represented by Pimentel has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them.

The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic

has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. If we dismiss the action for nonjoinder of the Republic, they will have no forum within the Philippines open to their claims. They might sue again within the United States, perhaps in New York, yet such a suit would merely raise the same question of indispensability.

Balancing of the Factors

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimentel and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

The Claims of Arelma and the Philippine National Bank

As the district court has determined, Arelma is a shell corporation, *Merrill Lynch* v. *Arelma, Inc.*, No. CV00-595-R, Slip Op. at 12 (D.Haw. Jul. 12, 2004), and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank as escrow holder now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

The Claims of Roxas and Golden Budha

Roxas was a victim, too. His injury was suffered before the date used to determine the Pimentel class. The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds

and in excluding depositions of fact witnesses from his earlier action against Marcos. We do not believe that the district court abused its discretion in either ruling. The expert failed to produce the report required by Fed. R. Civ. P. 26(a)(2), and the district court acted within its discretion in excluding his testimony. *See Yeti by Molly, Ltd.* v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-06 (9th Cir.2001). As for the depositions, they were excludable as hearsay because the cross examination in the prior proceeding was not undertaken by a party with a "similar motive to develop the testimony." Fed.R.Evid. 804(b)(1). We agree with the district court that the record does not support a finding that the Arelma assets were stolen from Roxas.

As the district court held, Roxas's tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed May 4, 2006.

Amended May 9, 2006.

Before JOHN T. NOONAN, SIDYNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER AMENDING OPINION AND AMENDED OPINION

NOONAN, Circuit Judge.

ORDER

The opinion filed on May 4, 2006, is amended as follows: on slip opinion page 5038, lines 29-32, the following sentence is deleted: "The phrase 'equity and good conscience' in our judicial usage is coterminous with the first opinions of the United States Supreme Court. *See Hollingsworth* v. *Ogle*, 1 U.S. 257, 1 Dall. 257, 1 L.Ed. 126 (1788)."

On slip opinion page 5038, line 29, the following sentence is added: "The phrase 'equity and good conscience' in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 181, 6 L.Ed. 289 (1825)."

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1149-52 (9th Cir.2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. See An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the ac-

tion. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand R. Marcos Human Rights Litigation*, 103 F.3d 762 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Rule 19(b).

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank* v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936

(1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109, 88 S.Ct. 733. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said: "the district court ... held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion." *Merrill Lynch* v. *Pimental*, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimental argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 181, 6 L.Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see*, *Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht* v. *Bowles*, 321 U.S. 321,

329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000) a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned

since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *International Harvester Co.*, 668 F.2d 142, 147 (2d Cir.1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary

meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas* v. *Marcos*, 109 Hawai'i 83, 123 P.3d 208 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986;

the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets. Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX C

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed May 4, 2006.

Before NOONAN, THOMAS, Circuit Judges, and JAMES L. ROBART,[1] District Judge.

NOONAN, Circuit Judge.

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of

[1] The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1149-52 (9th Cir.2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. See An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *Hilao* v. *Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to hu-

man rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be

prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Rule 19(b).

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank* v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109, 88 S.Ct. 733. Only if equity and good conscience require it is a necessary party also indispensable.

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What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000) a difficult controversy had been settled by an Accommodation Agreement entered

into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in

New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *International Harvester Co.*, 668 F.2d 142, 147(2d Cir.1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas* v. *Marcos*, 109 Hawai'i 83 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign

him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets. Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX D

United States Court of Appeals, Ninth Circuit.

In re REPUBLIC OF THE PHILIPPINES;

[remainder of caption omitted]

Nos. 01-71841, 02-15340.

Argued and Submitted June 14, 2002.

Filed Oct. 31, 2002.

Before: SCHROEDER, Chief Judge, HARLINGTON WOOD, JR.,[1] and D.W. NELSON, Circuit Judges.

SCHROEDER, Chief Judge.

This interpleader litigation is part of an on-going dispute between the Philippine government and creditors of the Estate of Ferdinand E. Marcos over assets Marcos allegedly secreted from the government while he was President of the Philippines. This litigation concerns the assets of Arelma Incorporated, a Panamanian company Marcos created. The assets were held in an account in New York by Merrill Lynch, the plaintiff in this action, until the assets were turned over to the district court in September 2000.

The defendant creditors include human rights victims whose claims we upheld in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). The Republic of the Philippines ("Republic") is also a defendant in this action as is the Presidential Commission on Good Government ("PCGG"), an agent or instrumentality of the Republic.

This is an appeal by the Republic and the PCGG from the district court's ruling on two motions to dismiss them as parties to the suit: the Republic and the PCGG's own motion to dismiss on sovereign immunity grounds and the creditors' motion to dismiss the Republic and the PCGG on the basis

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[1] The Honorable Harlington Wood, Jr., Senior Circuit Judge of the Seventh Circuit, sitting by designation.

that they are not real parties in interest. The district court granted the creditors' motion to dismiss and the Republic and the PCGG appeal. We reverse because we hold that the district court should have dealt with immunity first and that the Republic and the PCGG are immune from suit.

PROCEDURAL BACKGROUND

In 1972, Marcos transferred approximately $2 million to Arelma, placing the money in an account with Merrill Lynch in New York. After Marcos was deposed in 1986, President Corazon Aquino created the PCGG, an agency charged with recovering assets of the Republic that were wrongfully acquired by Marcos while he was in office. In July 2000, the PCGG asked Merrill Lynch to turn over the Arelma assets to the Philippine National Bank ("PNB"). The PCGG proposed that the PNB act as an escrow agent and hold the assets pending a ruling in the Sandiganbayan, a Philippine anti-corruption court, on whether the assets belonged to the Republic or the Marcos Estate.

Merrill Lynch denied the request, apparently because of the existence of other claimants, and instead filed this interpleader action in the U.S. District Court for the District of Hawaii on September 14, 2000, seeking to resolve conflicting claims to the Arelma assets. The complaint named as defendants several possible claimants. They included the Republic, the PCGG, Arelma, the Estate of Roger Roxas, the Golden Budha Corporation, and Mariano J. Pimentel. The Roxas Estate and Golden Budha assert claims as judgment creditors of the Marcos Estate on the basis of judgments obtained in state court. Pimentel is a member of the plaintiff class of human rights claims that obtained a judgment against the Estate on February 3, 1995. *See Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). The district court granted Pimentel's motion to join the PNB in May 2001.

The Republic and the PCGG moved to dismiss the interpleader arguing, *inter alia*, that they were entitled to sover-

eign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. Pimentel also moved to dismiss the Republic and the PCGG claiming that they were not real parties in interest. The Republic and the PCGG then asked the court to determine their immunity and dismiss the action because they claimed they were indispensable parties. Fed. R. Civ. P. 19(b). The district court held a telephonic hearing on September 24, 2001.

At that hearing, the district court said that it was granting Pimentel's motion to dismiss the Republic and the PCGG because the court found they were not real parties in interest. The court declined to decide any issue of sovereign immunity. The district court then entered a written order on December 20, 2001, that stated:

> Defendants PNB, with offices in Honolulu, and Arelma are the real parties in interest as to claims that may be proffered by the Republic and PCGG, and the former are capable of asserting claims to the assets that had been held by Merrill Lynch in account No. 165-07312 in the name of Arelma (the "Assets") and were deposited by Merrill Lynch with the Court, including the claim that the source of the Assets was stolen. The Republic and PCGG have both sought to be dismissed from the lawsuit on various grounds and have averred under oath that PNB has exclusive authority to control the assets at issue. Therefore, defendants PNB and Arelma are the real parties in interest as to claims that the Republic and PCGG may make in this interpleader proceeding.

The court denied as moot the Republic and the PCGG's motion to dismiss on sovereign immunity and ruled that "neither the Republic nor PCGG are necessary or indispensable parties in this litigation." The district court also continued its prior injunction that enjoined defendants named in the interpleader from bringing any further actions in the United States

to pursue the Arelma assets. The Republic and PCGG appeal their dismissal on the merits and the denial of their motion for dismissal based on sovereign immunity.

Because denial of a motion to dismiss on grounds of foreign sovereign immunity may result in the parties having to litigate claims over which the court lacks jurisdiction, we permit an interlocutory appeal from the denial of a motion to dismiss on sovereign immunity grounds. *See Schoenberg* v. *Exportadora de Sal, S.A.*, 930 F.2d 777, 779 (9th Cir.1991) (denial of motion to dismiss on grounds of foreign sovereign immunity is an appealable interlocutory order under collateral order doctrine). It is on that basis that we exercise jurisdiction over this appeal. We deny as moot appellants' mandamus petition filed as an alternative route to jurisdiction.

IMMUNITY UNDER THE FSIA

The effect of the district court's ruling was to adjudicate the merits of the Republic's claim to the assets and thus effectively deny its claim to sovereign immunity. The district court determined that the Republic and the PCGG had no claim to the Arelma assets, thus proceeding to the heart of the dispute, without first determining whether the Republic and the PCGG had sovereign immunity. We agree with the Republic that the district court should have addressed the merits of the immunity question first in order to preserve the immunity that may be determined to exist. *See Phaneuf* v. *Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir.1997) (noting that "[i]mmunity under the FSIA is not only immunity from liability, but immunity from suit"); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 706 (9th Cir.1992) (stating that before reaching the merits of a claim against a foreign state, court should determine whether it has jurisdiction under the FSIA).

The FSIA provides the sole basis for subject matter jurisdiction over foreign states and their agents or instrumentalities. *See* 28 U.S.C. § 1604. The FSIA provides that a for-

eign state is immune from the jurisdiction of U.S. courts unless one of the statutory exceptions applies. 28 U.S.C. §§ 1604, 1605. The creditors do not dispute that the Republic and the PCGG are, respectively, a foreign state and its instrumentality within the meaning of the FSIA. 28 U.S.C. § 1603. The creditors, however, have the burden of establishing that one of the statutory exceptions applies. *See Siderman*, 965 F.2d at 707. The only two exceptions claimed to be applicable here are the "successor" exception, 28 U.S.C. § 1605(a)(4), and the "implied waiver" exception, 28 U.S.C. § 1605(a)(1).[2]

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[2] 28 U.S.C. § 1605 provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to-

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of

The "successor" exception provides that a foreign state is not immune if "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The creditors argue that because some of them are judgment creditors of Marcos' family members that inherited the Marcos Estate, succession rights are "in issue" in the interpleader action within the meaning of the statute. The creditors do not contend that the Republic has acquired any

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title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph-

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C.App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if-

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state ...

right by succession. They argue that the statute requires only that some rights acquired by succession be "in issue" in the case, not necessarily the rights of the foreign sovereign. The creditors' interpretation of the statute is not supported by the statute, the legislative history, or principles of international law. For the reasons we now explain, we conclude the exception applies only when the sovereign's claim is as a successor to a private party.

The FSIA's exceptions focus on actions taken by or against a foreign sovereign. For example, § 1605(a)(1) provides that a foreign state is not entitled to immunity if the state either explicitly or implicitly waives immunity. Another exception provides that a foreign state does not have immunity when it carries out commercial activity in the United States. 28 U.S.C. § 1605(a)(2). Yet another exception applies when a party asserts a claim for money damages "against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5).

The legislative history to the FSIA also indicates that the "successor" exception is concerned with rights acquired by a foreign sovereign. The House Report stated:

> There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought ... The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

H. Rep. No. 94-1487, 94th Cong.2d sess. 6619. Thus, because the Republic is not a party by virtue of its succession to a private party's claim or putative liability, the exception does not apply in this case.

Any remaining doubt is resolved by looking to broader statements of international law. The Restatement (Third) of Foreign Relations Law states that under international law, "a state is not immune from the jurisdiction of the courts of another state with respect to claims ... to property, whether tangible or intangible, acquired by the state through succession or gift." *Restatement (Third) of Foreign Relations Law* § 455(1)(b) (1987). The Restatement also states that "[c]ourts in the United States may exercise jurisdiction over claims against a foreign state relating to property ... [acquired by the state through succession or gift] ... when the property is in the United States." *Id.* § 455(2). The focus is thus on whether the foreign state has acquired by succession, not whether any party to the action has acquired a right by succession.

The creditors also claim that the FSIA's "implied waiver" exception applies. 28 U.S.C. § 1605(a)(1). The "implied waiver" exception is construed narrowly. However, we generally find an implied waiver in only three circumstances:

> (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.

Joseph v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir.1987). None of these circumstances exist. There has been no consent to arbitration in this country; there is no contractual foreign law provision; and the Republic has consistently maintained its defense of immunity in this action. A motion to dismiss, which the Republic has filed, is not a responsive pleading. Fed. R. Civ. P. 12(b). The Republic and the PCGG in asserting their immunity on appeal state that they do not object to a stay of the interpleader action if we do not order the case dismissed entirely, but this procedural concession to protect their immunity is not a waiver of immunity as the creditors try to suggest.

The creditors point to a Philippine Executive Order as proof that the Republic intended to waive its sovereign immunity. Executive Order No. 2 authorizes the PCGG "to request and appeal to foreign governments wherein any such assets or properties may be found to freeze them and otherwise prevent their transfer, conveyance, encumbrance, concealment or liquidation by former President Ferdinand E. Marcos ... pending the outcome of appropriate proceedings in the Philippines." The order does not refer to instituting court proceedings outside the Philippines and on its face contemplates executive action by foreign governments.

The creditors finally argue that we should nevertheless remand the case to the district court for discovery on the sovereign immunity issue. They have not, however, pointed to any discovery that would help support their claim that the exceptions they assert apply in this case. We conclude that the Republic and the PCGG are immune from suit under the FSIA and the district court should have granted their motion to dismiss them as parties on that ground.

DISMISSAL OF INTERPLEADER ACTION UNDER RULE 19

The Republic and the PCGG go on to contend that not only must they be dismissed as parties, but that the entire interpleader action must be dismissed because they are necessary and indispensable parties. Fed. R. Civ. P. 19. The PNB and Arelma join in this argument. We first determine whether an absent party is "necessary" to the action in order to protect its own interests, and if so, we then determine whether the suit should not proceed in that party's absence because it is "indispensable." *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir.1992).

Rule 19(a) provides that a party is necessary and "shall be joined if feasible" in the following situations:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the

> person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Rule 19(a) is intended "to protect a party's right to be heard and to participate in adjudication of a claimed interest." *Shermoen*, 982 F.2d at 1317. Thus, if the Republic's claim to the Arelma assets was represented by one of the other claimants, then the Republic is not a necessary party.

The creditors contend that other claimants, Arelma and the PNB, can adequately represent the interests of the Republic and the PCGG. The Republic and PCGG maintain they are necessary parties because their claim, that the Arelma assets were misappropriated and have always belonged to the Republic, is one made by no other party. Arelma and the PNB agree.

The Republic and the PCGG are correct that they assert a claim distinct from those asserted by Arelma and the PNB. Without the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected. The Republic and the PCGG are therefore necessary parties. We turn to whether they are indispensable.

A party is indispensable under Rule 19(b) if in "equity and good conscience," the court should not allow the action to proceed in its absence. Fed. R. Civ. P. 19(b). *See also Dawavendewa* v. *Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1161 (9th Cir.2002). The Rule sets forth four factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person

> or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

This is an interpleader action. The purpose of such an action is to resolve in one proceeding all claims to a res. *See Commercial Union Ins. Co.* v. *United States*, 999 F.2d 581, 583 (D.C.Cir.1993). Without all significant claimants in an interpleader action, its purpose is materially frustrated. *Id.* Given the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how this interpleader action can proceed in their absence. Although this strongly suggests they are indispensable, under Rule 19 the court is permitted to take into account the equitable circumstances of the other parties in considering whether a case may go forward even in the absence of a necessary party.

The creditors contend the action should go forward because they lack an alternative forum for the resolution of their claims, because the Philippine court, the Sandiganbayan, will apparently decide only disputes between the Republic and the Marcos Estate. This lack of an alternative forum normally weighs heavily against dismissal of the action. *See Dawavendewa*, 276 F.3d at 1161-62. This, however, is an interpleader action that has as its core purpose the resolution of all competing claims. In the absence of parties with substantial claims like those of the Republic and the PCGG, this interpleader action cannot presently proceed.

Merrill Lynch also opposes dismissal contending that its interest will be severely prejudiced if the case is dismissed entirely, because it would be subject to competing claims that

would be filed in different jurisdictions and result in potentially conflicting judgments. Merrill Lynch therefore asks that in the event we conclude that the Republic and PCGG are necessary parties, as we have, we enter a stay of the litigation pending resolution of claims in the Philippines.

The Republic and the PCGG agree to such a stay as an alternative to their preferred remedy of dismissal of the entire interpleader action. We believe in light of concerns expressed by the creditors about the adequacy of the Republic's forum, a stay may further the creditors' interests as well as Merrill Lynch's, in the event that later developments may render it more equitably feasible for proceedings to go forward in this case. Such developments might include resolution of the litigation in the Philippines or a change in the immunity status of the Republic and PCGG.

Accordingly, the district court's order dismissing the Republic and the PCGG on the merits is vacated. The matter is remanded for entry of an order granting the Republic and the PCGG's motion to dismiss on the grounds of sovereign immunity and entry of a stay of further proceedings.

REVERSED AND REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERRILL LYNCH, PIERCE, FENNER
& SMITH INCORPORATED,
Plaintiff,
vs.
ARELMA, INC., et al.,
Defendants.
CASE NO. CV00-595-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, finds the facts and states the conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York.

2. Claimant Arelma S.A., named herein as Arelma, Inc. (Arelma) is a corporation organized under the laws of Panama in 1972 by Ferdinand E. Marcos, and at all times has been and is now a corporation in good standing under Panamanian law. No stock was issued in Arelma S.A. upon its formation. Ferdinand E. Marcos was the sole owner of Arelma S.A.

3. Claimant Philippine National Bank (PNB) is a commercial banking corporation organized under the laws of

the Republic of the Philippines with its principal place of business in Metro Manila, Philippines and with a Hawaii-licensed foreign bank agency maintaining an office in Honolulu, Hawaii.

4. Claimant Mariano J. Pimentel (Pimentel) is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff' class that obtained a judgment in the total sum of nearly two billion dollars on February 3, 1995 against the Estate of Ferdinand E. Marcos (Marcos Estate) in the legal action entitled "In Re Estate of Ferdinand E. Marcos, Human Rights Litigation," MDL No. 840 (the Human Rights Victims' Judgment). On May 26, 1995 in the same legal action a contempt order was entered against Imelda R. Marcos and Ferdinand R. Marcos, Jr., which included a fine in the amount of $100,000 per day.

5. Defendant Estate of Roger Roxas (Roxas), whose personal representative is Felix Dacanay, a resident of Florida, and defendant Golden Budha Corporation (Golden Budha), a corporation organized under the laws of the State of Georgia, (collectively Roxas/Golden Budha) obtained a judgment, entered nunc pro tunc as of October 21, 1996, against Imelda Marcos, in her personal capacity to the extent of her interest in the Marcos Estate, in the sum of $19,275,848.37, plus taxable costs of $61,074.54 (the Roxas/Golden Budha Judgment).

6. All other named claimants have defaulted, have disclaimed any interest in the subject matter of this interpleader or have been dismissed by the Court, other than defendants ENC Corporation, John K. Burns and Frontier Risk Capital Management, LLC, each of whom filed Answers to the Complaint on file herein, but did not appear at trial. There is no evidence in support of any claim of those three defendants to the interpleaded assets.

7. Ferdinand E. Marcos served as president of the Philippines from 1965 until February 1986. (Jt. Pretrial Stip.) He

was the de jure government of the Republic of the Philippines during his term in office.

8. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii on September 29, 1989. (Jt. Pretrial Stip.)

9. In 1972 Jean Louis Sunier, a Swiss banker, recommended to Ferdinand E. Marcos, through Marcos' friend Jose Campos, that Marcos set up a securities trading account in the United States. (Ex. 2)

10. The creation of Arelma in September 1972 coincided with Ferdinand E. Marcos' declaration of martial law in the Philippines. (Ex. 40)

11. During martial law, Marcos increased his individual power so that he could personally govern and direct the operation of the entire government. (Ex. 33 and 40) By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. (Ex. 34 and 40) Thousands were subjected to hideous tortures. Thousands more were summarily executed and others simply "disappeared." (Ex. 35 and 40)

12. The Swiss banker recommended that the account be in the name of a Panamanian corporation called Arelma, Inc. which he caused to be formed in Panama in September 1972. (Ex. 2)

13. A securities account No. 165-07312, was established at Merrill Lynch in New York by Arelma in 1972. (Jt. Pretrial Stip.) On the account opening form Merrill Lynch listed the Arelma entity as a "holding company." (Ex. 6)

14. The account of Merrill Lynch was funded by Arelma with a deposit of $2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The source of those funds was Ferdinand E. Marcos.

15. The property which is the subject of this interpleader, is the assets which were held in a securities account No. 165-07312 at Merrill Lynch in the name of Arelma. (Jt.

Pretrial Stip.)

16. Merrill Lynch deposited the entire assets in account No. 165-07312, approximately $35 million, with the Clerk of the Court in Federal Court in Hawaii after Merrill Lynch filed this action in interpleader. (Jt. Pretrial Stip.; Ex. 32) Merrill Lynch makes no claim to ownership of Arelma assets.

17. The only share certificates in Arelma were issued in 1981 (9 years after its formation) when two bearer share certificates for 50 shares each were issued "in blank," meaning no name was inserted on the share certificates. Jean Louis Sunier, an officer of Swiss Bank corporation until 1983 and an officer and director of Suntrust Investment Co. thereafter, maintained possession and custody of the share certificates in trust for Ferdinand E. Marcos from 1981 until he surrendered them to the Swiss government as directed by that government in 2000. (Jt. Pretrial Stip.; Sunier Dep. 67) No Swiss court determined the ownership of the share certificates.

18. Arelma had the same officers, Messrs Sunier and Barbey who were Swiss Bank Corporation employees, until 1981 when the Bank required its employees to resign as officers of corporations whose financial affairs it managed. In 1983 Mr. Sunier arranged for three of his personal lawyers to be elected the new officers in a meeting held in his office at the Bank. Until 2000 these officers never changed and the officers never took any actions on behalf of Arelma. (Sunier Dep. 69; Ex. 19 and 29)

19. In early communications to the owner, Sunier used the euphemism of "friend" or "friends" when referring to Marcos. (Ex. 2, 13 and 14) In a letter dated May 19, 1983, to the account holder addressed "Dear Excellency" and containing the code word "Sapphire", Mr. Sunier gave the current account balance. (Sunier Dep. 86) Sunier also explained his change of Arelma officers but assured the account holder that "I keep on controlling all operations for the companies." The

reference to "Excellency" is to Fedinand E. Marcos. (Ex. 19)

20. From its inception, Arelma had articles of incorporation (or corporate constitution) but no corporate by-laws. The articles of incorporation required the shareholders to hold an annual meeting and to elect directors annually. (Ex. 46)

21. Arelma never held an annual shareholder meeting; and only held director meetings on two occasions over 28 years to change officers and directors and to issue the two stock certificates. (Sunier Dep. 87 and 89; Ex. 29)

22. Other than the two meetings of board members, Arelma has no minutes of director meetings prior to 2000. (Sunier Dep. 89)

23. Arelma never had any employees. (Sunier Dep. 90)

24. Arelma never had an accountant and never paid any income or corporate taxes. (Sunier Dep. 90)

25. Arelma never had standard financial statements, such as a balance sheet or profit and loss statement. (Sunier Dep. 90)

26. Arelma never had any assets except for the Merrill Lynch account and a small account at Swiss Bank Corporation. (Sunier Dep. 92)

27. Arelma never maintained an office or place of business, and used a Swiss address (Swiss Bank Corporation and later Suntrust) as an address for mail. (Ex. 10, 21)

28. Arelma never paid taxes to any taxing authority other than Panama, and that related solely to the fee for Arelma's continued incorporation. After 1983 these were paid by Suntrust for which it was reimbursed by transfers from Arelma's account at Merrill Lynch. (Ex. 25, 26, 30)

29. In 1987 a New York Federal court in the case of *Republic of the Philippines* v. *Ferdinand E. Marcos* froze the Arelma account at Merrill Lynch. (Ex. 23; Sunier Dep. 81) No claim of sovereign immunity was made in that case freezing the Arelma account.

30. The Swiss Federal Supreme Court has twice held that Ferdinand E. Marcos controlled Arelma and that Marcos had the power of disposition over Arelma. Arelma was a party in both proceedings and represented by legal counsel. (Ex. 47 at A14 and Ex.48 at C17)

31. In 1997 Imelda Marcos engaged John Burns, a banker, to try and recover the assets in the Merrill Lynch account on behalf of the Estate of Ferdinand E. Marcos. Imelda Marcos and Ferdinand R. Marcos, as executors of his Estate, executed powers of attorney to Burns for this purpose, and he made a demand on Merrill Lynch to release the assets. (Burns Dep. 21-23; Ex. 28 and 29)

32. Sunier's power of attorney expressly included the duty to appear and act on behalf of Arelma in legal proceedings. (Ex. 46) In 1997 Sunier acknowledged in a signed statement to Swiss authorities that the formation of Arelma in September 1972 was part of a new relationship with Ferdinand Marcos. He acknowledged that he held the Arelma share certificates and was the only person in contact with the Marcos family. (Ex. 29)

33. Suntrust and Sunier have admitted that Arelma was incorporated to receive funds owned by Ferdinand Marcos, and that Marcos controlled Arelma during his lifetime. (Ex. 44; Sunier Dep. 46-47) Upon Marcos death that control passed to his Estate.

34. The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead. (Pimentel Dep. 84-85 and 93-94)

35. The class of Filipino Judgment Creditors in MDL No. 840 has a Final Judgment entered February 3, 1995 against the Estate of Ferdinand E. Marcos in the principal amount of $1,964,005,859.90 plus interest at the rate allowed by 28 U.S.C. §1961 which has not been satisfied. (Jt. Pretrial Stip.)

36. The class of Filipino Judgment Creditors in MDL No. 840 has a contempt award against Imelda R. Marcos and Ferdinand R. Marcos, personally, in the amount of $100,000 per day which had been running since June 30, 1995, and which has not been satisfied. (Jt. Pretrial Stip.)

37. Neither Golden Budha Corporation nor Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against the Estate of Ferdinand E. Marcos. (Jt. Pretrial Stip.)

38. Golden Budha Corporation has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $13,275,848.37 as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the class of Filipino Judgment Creditors in MDL No. 840.

39. Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $6 million as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840.

40. PNB, as an escrow agent, holds the two bearer share certificates owned by the Estate of Ferdinand E. Marcos, issued by Arelma pursuant to an Escrow Agreement dated August 14, 1995 between PNB and the PCGG. (Jt. Pretrial Stip.)

41. The two Arelma bearer share certificates owned by the Estate of Ferdinand E. Marcos were delivered to PNB by the PCGG which obtained them from the Swiss government.

(Jt. Pretrial Stip.)

42. Suntrust Investment Co. has disclaimed any interest in the interpleaded assets. (Jt. Pretrial Stip.)

43. Pursuant to the Swiss Closing Order, the Arelma bearer share certificates were subsequently returned to the Philippines and since on or about July 28, 2000, have been in the possession of and held by PNB, as escrow holder, according to the Arelma Escrow Agreement.

44. On or about November 20, 2000, the Board of Directors of Arelma held a special meeting at which the Board of Directors granted a general power of attorney in favor of PNB to represent Arelma in seeking the transfer of the assets in the Arelma Account to PNB as escrow holder. (Trial Exhibits 125 and 136) There is no evidence that the Board of Directors was duly elected and acting for Arelma S.A. owned by Ferdinand Marcos.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. §2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. §1655 and the doctrines of *quasi in rem and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of the Court.

3. Venue is based upon 28 U.S.C. §1397 since two of the claimants, Pimentel and PNB reside in Hawaii.

4. Arelma was properly served pursuant to FRCP Rule 4(k)(l)(C) which provides for nationwide service of process: "Service of summons is effective to establish jurisdiction over the person of a defendant [claimant] ... who is subject to the Federal interpleader jurisdiction under 28 U.S.C.

§1335..." *See Rubinbaum* v. *Related Corporate Partners V*, 154 F.Supp.2d 481, 486 (SDNY 2001).

5. Minimum jurisdiction contacts are satisfied for purposes of personal jurisdiction over Arelma, Inc. since it had a multi-million dollar trading account at Merrill Lynch in New York between 1972 and 2000. *See SIPC* v. *Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985).

6. Because this Court has Federal subject matter jurisdiction based on the Federal Interpleader Statute, 28 U.S.C. §1335, and *in rem* jurisdiction under 28 U.S.C. §1655, federal substantive law applies, although a Federal court may look to state law for guidance. *Board of Trustees* v. *Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 772 (9th Cir. 1989). In this case, New York has the most significant contacts to the interpleaded assets.

7. It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the *alter ego* doctrine among private parties. See *First National City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result" [citations and footnotes omitted]); *Itel Containers International Corp.* v. *Atlanttrafik Express Service Ltd.*, 1988 U.S.Dist. LEXIS

7051 at 12 (S.D.N.Y. 1988); *Marlowe* v. *Argentine Naval Commission*, 604 F.Supp. 703, 705 (D.D.C. 1985); *Edwards* v. *Schillinger*, 245 Ill. 231, 91 N.E. 1048, 1053 (1910) (term "internal affairs" does not extend to cheating creditors, but must be confined to relations affecting only stockholders and corporation among themselves).

8. Under federal common law, a corporation's veil may be pierced based upon three factors:

a) the amount of respect given to the separate identity of the corporation by its shareholders;

b) the degree of injustice visited upon the litigants by recognition of the corporate entity; and

(c) the fraudulent intent of the incorporators.

Board of Trustees v. *Valley Cabinet & Mfg. Co.*, *supra*. For a party to prevail, he must satisfy the first prong and either the second or third prong. *UA Local 343* v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (9th Cir.), cert. denied, 133 L.Ed.2d 203 (1995). Piercing of the corporate veil is an equitable remedy addressed to the discretion of the court. *McClaran* v. *Plastic Industries, Inc.*, 97 F.3d 347 (9th Cir. 1996). The law of New York is similar to Federal law on this subject. See *Goya Foods, Inc.* v. *Unanue*, 233 F.3d 38, 43 (1st Cir. 2000) (applying New York law). New York law, like Federal law, permits "reverse piercing" of the corporate veil. *Id.*

9. PNB, as escrow agent for the parties claiming ownership of the Arelma share certificates, lacks standing to seek ownership of the proceeds of the Merrill Lynch account which was maintained in the name of Arelma., Inc. See *Dole Food Co.* v. *Patrickson*, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of ownership of shares, does not own the corporation's assets..."). Moreover, Arelma itself is a party actively seeking control of the assets at issue.

10. Arelma and PNB are collaterally estoppel from de-

nying or opposing the findings of the Swiss Federal Supreme Court that Ferdinand Marcos controlled Arelma. (Lebrecht Dep. 27-31)

11. The Marcoses had a highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods, including aliases and shell corporations. See *Hilao* v. *Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994); *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir. 1988); and *Republic of the Philippines* v. *Marcos*, 806 F.2d 344 (2nd Cir. 1986).

12. The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos.

13. Arelma was controlled by Ferdinand E. Marcos or his representatives during his lifetime.

14. Arelma served no legitimate purpose other than to hide the assets of Ferdinand E. Marcos.

15. There was complete disregard of Arelma's corporate identity by everyone who dealt with Arelma's business.

16. The sole deposit of $2 million into Arelma's Merrill Lynch account in November 1972 coincided with Marcos' declaration of martial law and the inception of massive *jus cogens* human rights abuses for which Marcos was responsible.

17. A Class of 9,539 human rights victims (or their heirs) have a final judgment against the Estate of Ferdinand E. Marcos for almost $2 billion, plus interest.

18. It would be unjust to prevent the Class of persons tortured, summarily executed and disappeared from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment.

19. Golden Budha and Estate of Roxas have not proved that the assets in the Merrill Lynch account derived from as-

sets allegedly stolen from them.

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate.

21. Arelma cannot recover the proceeds of the account at Merrill Lynch since it was the *alter ego* and instrumentality of Ferdinand E. Marcos, and its claim is subordinate to the claim of the Class as judgment creditors of the Estate of Marcos.

22. Pimentel and the Class of Human Rights victims are entitled to the entirety of the interpleaded assets, and the Clerk of the Court is directed to transfer those assets to the account in the Clerk's Office established in MDL No. 840 pursuant to paragraph 10 of the Final Judgment of February 3, 1995 in that action.

Dated: July 12, 2004.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERRILL LYNCH, PIERCE, FENNER
& SMITH INCORPORATED,
Plaintiff,
vs.
ARELMA, INC., et al.,
Defendants.
CASE NO. CV00-595MLR

[Defendant Pimentel's Proposed]
Findings of Fact and Conclusions of
Law re Rule 19(b) Motion

Defendant Mariano Pimentel submits the following proposed findings of fact and conclusions of law in support of his position that the Court should deny the pending Rule 19(b) Motion:

1. This Court has jurisdiction pursuant to 28 U.S.C. 1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. 1655 and the doctrines of *quasi in rem and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of Court.

2. Based on the undeveloped state of the record before the Count of Appeals, it found the Republic of the Philippines and its PCGG to be necessary parties under FRCP 19(a) with regard to the claim that the monies deposited in the Arelma account at Merrill Lynch were misappropriated from the Republic. See *In re Republic of the Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002). The Court of Appeals held that the Republic and its PCGG are entitled to be dismissed

from this proceeding based on sovereign immunity, and they have been dismissed. It also found that there is no alternative forum to litigate the claims of the parties to the assets deposited with this Court. *Id.* at 1153.

3. The Court of Appeals reversed and remanded for further consideration by this Court the question of whether the Republic and its PCGG are indispensable parties within the meaning of FRCP 19(b). The parties have completed discovery; the Court reviewed testimony and documents in connection with various motions, including a motion for summary judgment; and the record now contains more information than when this Court first addressed the indispensable party issue.

4. The claim of the Republic and PCGG arises no later than 1972 when the $2 million was deposited into the Arelma account established at Merrill Lynch in New York. The Republic has been aware of the deposit since 1986 when the government of Corazon Aquino was installed. In April 1987 the United States Justice Department, acting on information from the Republic, froze the Arelma account at Merrill Lynch.

5. In December 1991 the Republic filed a Petition in the Sandiganbayan (a Philippine court) against the Estate of Ferdinand E. Marcos alleging forfeiture of certain assets held in Marcos controlled accounts in Swiss banks. There is no claim in that lawsuit seeking forfeiture of the assets in the Arelma account at Merrill Lynch.

6. On July 15, 2003 the Philippine Supreme Court ruled that the Republic was entitled to the assets in the Marcos controlled accounts in Swiss banks. Those assets had been transferred to the custody of the Philippine government's escrow agent in 1997. There is nothing in that decision which mentions Arelma or Arelma's account at Merrill Lynch or which impacts in any way on this litigation.

7. No pleading has been brought to the attention of this

Court showing that there is any legal proceeding in the Philippine courts or the courts of any other country regarding the Arelma assets deposited at Merrill Lynch. Allegations have been made that there is a legal proceeding in the Philippines to determine ownership of two Arelma share certificates transferred by Swiss authorities to the escrow agent of the Republic in 2000, but no document substantiating that has been produced even though the escrow agent, Philippine National Bank, is a party in this litigation.

8. Ownership of the Arelma share certificates is irrelevant to this proceeding since Arelma is a party actively seeking control of the assets at issue and Arelma's shareholders have no standing to pursue assets allegedly belonging to the corporation. *See Dole Food Co.* v. *Patrickson*, 123 S.Ct. 1655 (2003).

9. Any claim by the Republic or its PCGG for misappropriation of its assets would be barred by an applicable statute of limitations. The statute of limitations in New York is three years from the taking, N.Y. C.P.L.R § 203, or two years after it was discovered. N.Y. C.P.L.R. § 203. Actions against estates have to be commenced within a year of death. N.Y. CP.L.R § 210 The statute of limitations in the Philippines is four years. Civ. Code Phil. Art. 1146(2). Therefore, the Republic and its PCGG have no legally protectible interest in the assets at issue in this proceeding.

10. Parties asserting dismissal for failure to join an indispensable party bear the burden of proof that the criteria of FRCP 19(b) are satisfied. *See In re Stat-Tech Sec. Litigation*, 905 F.Supp. 1416 (D.Colo. 1995)(burden of proof is on party raising the defense).

11. Rule 19(b) of the Federal Rules of Civil Procedure is addressed to the discretion of the Court acting "in equity and good conscience" and requires a careful analysis of multiple considerations before allowing dismissal of an entire litigation for failure to join an indispensable party. "A court of eq-

uity will strain hard" to avoid dismissal. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

12. The four factors listed in Rule 19(b) are "overlapping" and "not intended to exclude other considerations which may be applicable in particular circumstances." Official commentary on the 1966 amendment to Rule 19(b).

13. Under Rule 19(b), in order for an interest to be "impaired, it must be shown that a "necessary" party has a "legally protectible claim," not merely a potential claim. *American Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002); *Makah Indian Tribe* v. *Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

14. Expiration of an applicable statute of limitations precludes a "necessary" party from having a legally protectible Claim. *See generally Virginia Elec. & Power Co.* v. *Westinghouse Elec. Corp.*, 485 F.2d 78, 86 n.22 (4th Cir. 1973) cert. denied 415 U.S. 935; *Wheelock* v. *Sport Kites, Inc.*, 839 F.Supp. 730 (D.Haw. 1993); and *Young* v. *United Steelworkers of America*, 49 F.R.D. 74, 75 (E.D.Pa. 1969); all holding that expiration of the statute of limitations on a party's claim is relevant under Rule 19(b).

15. The claim of the Republic and its PCGG for misappropriation is not a legally protectible claim, so proceedings herein cannot impair that claim. Nor will proceedings herein impair any effort by the Republic and its PCGG to acquire the Arelma stock certificates. Neither res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party.

16. The Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets. "An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him." *Takeda* v. *Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985). The Republic

and PCGG must accept "the disadvantages as well as the advantages that flow from" their "strategic election." *Citibank International* v. *Collier Traino Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987).

17. The defendants have no standing to participate in forfeiture proceedings between the Republic and the Marcoses in Philippine courts. The lack of an alternative forum is a significant factor to be considered under Rule 19(b). *See Provident Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 110 (1968).

18. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii in September 1989. It is important to bring finality to claims against his purported assets after these many years.

19. The absence of the Republic and PCGG as parties will not prejudice any party. Any prejudice to Merrill Lynch will be mitigated by the fact that the Republic and its PCGG have no legally protectible claim; and the doctrine of prior exclusive jurisdiction that would transfer any future claim brought in a United States court against Merrill Lynch to this Court. See *Farmers Loan and Trust Co.* v. *Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900). Merrill Lynch was aware of the dismissal of the Republic and PCGG on sovereign immunity grounds when it renewed and received an order discharging it, thereby indicating it believed any prejudice was minimal.

20. Plaintiff Merrill Lynch will not have an adequate remedy if this proceeding is dismissed since it would have to defend multiple lawsuits seeking the same relief.

21. A judgment rendered in the absence of the Republic and PCCG will be adequate.

22. The moving parties have not sustained their burden of proof.

23. Based on the above facts, equity and good conscience require that the motion to dismiss for lack of an in-

dispensable party be denied.

Dated: Aug 14, 2003.

/s/
Manuel L. Real, Judge

APPENDIX G

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Nov. 3, 2006.

Before JOHN T. NOONAN, SIDNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER

The panel has voted to deny the petitions for rehearing. Judge Thomas has voted to deny the petitions for rehearing en banc and to deny any further petitions, and Judge Noonan and Judge Robart so recommend.

Petitioners' fears of *res judicata* are baseless.

The Republic's claims of prejudice under Rule 19(b) are without merit, because its suit to recover the Arelma assets in the Philippines is a forfeiture action, one which a unanimous *en banc* Philippine Supreme Court has "categorically declared" is *in rem. Rep. of the Phil.* v. *Sandiganbayan*, (Nov. 18, 2003). The Republic has no jurisdiction over the *rem*, which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States. Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(a) (1987).

Petitioner also omits the crucial language in *American Greyhound*, *see* Pet. Reh'g at 6, which reads, "some courts have held that sovereign immunity forecloses in favor of

* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes." *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (9th Cir.2002).

The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed.R.App.P. 35.

The petitions for rehearing en banc are DENIED.

APPENDIX H

FEDERAL RULE OF CIVIL PROCEDURE 19

(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff

will have an adequate remedy if the action is dismissed for nonjoinder.

* * *

APPENDIX I

DIPLOMATIC NOTE FROM THE REPUBLIC OF THE PHILIPPINES TO THE U.S. DEPARTMENT OF STATE

No. WCG-023-07

The Embassy of the Republic of the Philippines presents its compliments to the Department of State, and has the honor to bring to the latter's attention the Philippine Government's position regarding the decision of the United States Court of Appeals for the Ninth Circuit in ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.***, 464 F.3d 885 (9th Cir. 2006), as modified on denial of rehearing by 467 F.3d 1205 (9th Cir. Nov. 3, 2006).

This decision presents a matter of the utmost concern to the Philippines inasmuch as it effectively negates any meaningful exercise of sovereign immunity and interferes with the ability of foreign nations, such as the Philippines, to proceed in their own courts with claims seeking forfeiture of assets in cases of political corruption by high government officials.

The recovery of the ill-gotten wealth of former President Ferdinand E. Marcos is a preeminent responsibility of the Philippine Government and represents a national interest of the Republic that is of the highest order. In pursuit of that interest, the Philippines, acting through its Presidential Commission on Good Government (PCGG), has been vigorously pursuing such assets within the Philippines and through cooperative international civil and criminal enforcement efforts in various countries around the world. As part of those efforts, it has enlisted the support of the criminal and civil enforcement authorities in such countries, including through various mutual assistance treaties. These efforts are typical of those engaged in within the international community. Resort to such cooperation has often been sought by the United States in matters involving the forfeiture of property. Ensuring the effectiveness of such cooperation among friendly na-

tions in matter[s] involving the misappropriation of public assets by high-ranking former government officials is a subject of the highest importance in maintaining respectful relations among nations.

As part of these efforts, it is critically important for courts to respect the long-recognized and vital doctrine of sovereign immunity. It is equally important that sovereign nations be permitted to pursue claims seeking the forfeiture of misappropriated property resulting [from] political corruption within their own judicial systems and to have such determinations recognized and enforced by the courts and executive authorities of other nations. Both of these important principles have been called into serious question by the recent decision of the Ninth Circuit that the Philippine Government now respectfully brings to the attention of the relevant authorities of the United States Government.

The Philippine Government therefore intends to request a review by the United States Supreme Court of this decision and earnestly seeks the assistance of the Department of State in supporting that request by encouraging the Solicitor General to file a brief *amicus curiae* in support of the Philippine Government's Petition.

In this connection, the Embassy has the honor of enclosing, as part of this Note, a background paper which describes in detail the issues involved in the case and the Philippine Government's position therein.

The Philippine Government is of the view that the United States Government's support on this matter would be consistent with the spirit of mutual friendship and robust cooperation which characterizes the relationship between the two countries, and would serve as the latest demonstration of reciprocal goodwill between both Governments.

The Embassy of the Republic of the Philippines avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
5 February 2007

FILED
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SUPREME COURT, U.S.

Nos. 06-1039 & 06-1204

In The Supreme Court of the United States

ESTATE OF ROGER ROXAS, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL,

Respondent.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the lower courts followed the test set out in Rule 19(b) of the Federal Rules of Civil Procedure and in *Provident Tradesmens Bank & Trust Co. v. Patterson* in concluding that the Republic of the Philippines and its PCGG were not indispensable parties to this interpleader litigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Two petitions for writ of certiorari were filed in this matter, No. 06-1039 and No. 06-1204. Respondents to both petitions are Mariano J. Pimentel and a Class of 9,539 Filipino Human Rights Victims. Petitioners are Republic of the Philippines, Philippine Presidential Commission on Good Government, Philippine National Bank, and Arelma, Inc. (No. 06-1204), and The Estate of Roger Roxas and the Golden Budha Corporation (No. 06-1039). Petition No. 06-1204 identifies The Estate of Roger Roxas and the Golden Budha Corporation as additional Respondents.

Petitioner, Republic of the Philippines ("Republic"), owns 16% of the outstanding stock of Petitioner, Philippine National Bank ("PNB"), and elects 4 of its 11 directors. Rogel Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.* All the outstanding shares of Arelma, a Panamanian corporation, are currently held by PNB pursuant to the escrow agreement, and the directors of Arelma are elected either directly or indirectly by the Republic and its agency, the Presidential Commission on Good Government. *Id.* at 25-36.

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FEDERAL CASES

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Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405 (11th Cir. 1998) 15

Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003) 11

Bourdieu v. Pacific Western Oil Co., 299 U.S. 65 (1936) 16

Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952) 16

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) 18

Davis v. United States, 192 F.3d 951 (10th Cir. 1999) 16

Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 276 F.3d 1150 (9th Cir. 2002) 12

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Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ...13, 20

Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3d Cir. 1998) 27

Heath v. Aspen Skiing Corp., 325 F. Supp. 223 (D. Colo. 1971) 16

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Hecht Co. v. Bowles, 321 U.S. 321 (1944) 8

Hilao v. Estate of Ferdinand Marcos, 103 F.3d 762 (9th Cir. 1996) 1, 2

Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996) 1, 2

Imperial Appliance Corp. v. Hamilton Mfg. Co., 263 F. Supp. 1015 (E.D. Wis. 1967) 18

In re Estate of Ferdinand E. Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Hi. 1995) 1

In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994) 13, 20, 21

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Mescalero Apache Tribe v. State of New Mexico, 131 F.3d 1379 (10th Cir. 1997) 18

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STATEMENT OF THE CASE

The judgment in this statutory interpleader action awarded approximately $35 million in an account at Merrill Lynch, Pierce, Fenner & Smith, Inc., to the Class of 9,539 victims of grave human rights abuses during the 1972-86 martial-law regime of Ferdinand E. Marcos in the Republic of the Philippines ("Republic"). The Class members were seeking to collect on their judgment of almost $2 billion rendered in an historic human rights action, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996); ROP App. 49a, 53a.[1] The Class members, including heirs of victims, represented in this action by Mariano Pimentel, are those who were "subjected to hideous tortures," "summarily executed" or "simply disappeared." ROP App. 45a; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462-63 (D. Hi. 1995) (listing specific forms of torture used). They were victims of "massive *jus cogens* human rights abuses for which Marcos was responsible." ROP App. 53a. But for the filing of the petitions for certiorari in this Court, the Class members, most of whom live in poverty, would have already received a court-ordered first installment of $2,000 each from the assets at issue. Order of 6/27/2006 at 3 (Dkt. No. 409).

While Marcos was concealing and investing his own assets during martial law, he orchestrated and directed massive human rights abuses. ROP App. 53a. Marcos directly controlled all military and para-military groups in the Philippines. ROP App. 44a-45a. "By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. Thousands were subjected to hideous tortures. Thousands more

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[1] Citations to the record, where relevant, are preceded by the abbreviation of each petitioner's name: ROP for the Republic and GBR for Golden Budha/Roxas. "Dkt. No." refers to the corresponding official docket entry numbers in the interpleader action filed in the District Court of Hawaii, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma Inc., et al.*, No. 00-595 (D. Hi. 2000).

were summarily executed and others simply 'disappeared.'" ROP App. 45a. As the District Court found:

> The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead.

ROP App. 48a.

Merrill Lynch brought this interpleader action on September 14, 2000[2] to determine the entitlement to Merrill Lynch securities account No. 165-07312 established by Ferdinand E. Marcos in 1972 in the name of Arelma Inc.

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[2] The Republic's assertion of "manufactured" jurisdiction is bogus. Pimentel and the Class of Human Rights Victims sued Merrill Lynch in federal court in Hawaii on September 6, 2000 regarding the assets in Arelma's securities trading account. Order of 3/22/2001 at 6 (Dkt. No. 56). Merrill Lynch then filed the present interpleader complaint on September 14, 2000 in the federal court in Hawaii as a result of an agreement reached with Pimentel's counsel to interplead the assets into that court in return for dismissal of the September 6 lawsuit without prejudice. Compl. for Interpleader (Dkt. No. 1). At a conference in the MDL action on September 11, 2000, the judge encouraged this solution in the presence of counsel for the Republic. Judges often urge such solutions. *See Texaco, Inc. v. Ponsoldt*, 118 F.3d 1367, 1368 (9th Cir. 1997) (as part of a settlement agreement the District Court urged the filing of an interpleader). Merrill Lynch sought the District Court's advice to avoid any issue of whether a transfer of the assets would violate the permanent injunction contained in the Class' 1995 Judgment. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 762 (9th Cir. 1996) (affirming contempt citation for violating permanent injunction). A separate federal judge in Hawaii, ruling on the Republic's recusal motion, found "the court did not direct, order, or require Merrill Lynch to file the instant action" and noted that "[t]he Court concurred with Plaintiffs' Class that the action should be filed in the District of Hawaii." Dkt. No. 56 at 5-6.

("Arelma"), a sham corporation incorporated in Panama for the purpose of hiding actual ownership of these assets. ROP App. 46a-47a. The account was begun with $2,000,000 provided by Marcos, and in the intervening years grew to about $35,000,000. ROP App. 45a-46a. The assets were deposited in the U.S. District Court of Hawaii for the purpose of this litigation. ROP App. 46a.

The record in this case, developed through four years of protracted and contentious litigation, contains undisputed evidence that the Merrill Lynch account was established at the explicit direction of Marcos with funds he provided. "Arelma is a shell corporation" (ROP App. 10a); "[Ferdinand E.] Marcos controlled Arelma during his lifetime" (ROP App. 48a); "Arelma was incorporated to receive funds owned by Ferdinand Marcos" (ROP App. 48a); and, "[t]he source of those funds [in the Merrill Lynch account] was Ferdinand E. Marcos." ROP App. 45a. "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." ROP App. 53a.

As the District Court found, the Republic knew about the securities trading account at the Merrill Lynch account since at least 1986. In 1987 the Republic obtained an injunction from a federal court in New York freezing the account. ROP App. 47a; Order of 8/14/2003 (ROP App. 56a). Although the Republic filed a dozen or more lawsuits in courts throughout the United States seeking to recover various Marcos assets, it never filed a lawsuit to recover the Merrill Lynch account. ROP App. 58a. The Republic participated in at least one other interpleader proceeding in the United States involving a Picasso painting allegedly owned by Marcos. *Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). The Republic never asserted its sovereign immunity in any of those proceedings. *See, e.g.*, ROP App. 47a.

There was no evidence in discovery or at trial that supported the Republic's position that the monies were "misappropriated" or "stolen" as alleged in the Republic's

Petition. At no time has the Republic ever come forth with evidence that the money at issue belonged to it. Although the Republic did not participate directly in the interpleader after the Republic's dismissal from the litigation, it participated indirectly since (a) after 2000, it controlled Arelma, worked with Arelma's counsel, and paid for Arelma's prosecution of the litigation, and (b) it controlled the escrow agent, Philippine National Bank ("PNB"), owned 16% of PNB's stock, and elected 4 of its 11 directors. Rogel Zenarosa Dep. at 9-12. Neither Arelma nor PNB ever garnered evidence supporting the Republic's allegation that the Merrill Lynch account derived from the Republic's assets.[3] ROP App. 53a.

The Republic moved to dismiss itself on sovereign immunity grounds in this litigation only after losing a motion to recuse the judge assigned to the case. *See* Dkt. No. 56. After being dismissed as a party, the Republic, as a nonparty, persisted in delaying and staying the litigation by filing numerous motions, mandamuses and appeals.[4] The Republic's persistent refrain – that Philippine courts would soon rule on entitlement to the interpleaded assets – resulted in stays of proceedings totaling 17 months. One stay was terminated by the District Court when Pimentel conclusively showed the Court that there was no case pending in the Philippines seeking determination of the ownership of the Merrill Lynch account. ROP App. 56a-57a. Four days after entry of the July 12, 2004 judgment herein, the Republic filed new motions in the Philippines to reopen long closed litigation there to have a Philippine court countermand the District Court's award of the assets

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[3] The Republic's representation that the assets in the Arelma account were a "subset" (ROP Pet. at 4) of the two stock certificates controlled by Swiss authorities is legally and factually wrong. The Swiss government never had possession or control of the assets in the Merrill Lynch account. ROP App. 46a. As a legal matter, a stockholder does not own or control the assets of the corporation. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); ROP App. 52a.

[4] This Court held in *Karcher v. May*, 484 U.S. 72, 77 (1987), that a nonparty has no standing to appeal.

at issue to the Class of Filipino victims. After almost three years, the Philippine court still has not ruled on the motion.

In an earlier appeal, *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002), the Ninth Circuit agreed that the Republic was entitled to dismissal on sovereign immunity grounds, and even held the Republic was a necessary party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. However, it declined to accept the Republic's argument that it was an indispensable party to this litigation pursuant to Rule 19(b). *Id.* at 1153. On remand, the District Court made detailed findings and conclusions holding the Republic was not an indispensable party. ROP App. 58a-60a. An interlocutory appeal on that issue was denied by the Ninth Circuit on February 20, 2004 (Dkt. No. 375), clearing the way for a trial.

At trial, Pimentel and the Class prevailed in proving that Arelma was an *alter ego* of Ferdinand Marcos and that their claim, based on their 1995 judgment against the Marcos Estate, had priority to the interpleaded assets. ROP App. 53a-54a. PNB's claim, based on ownership of the Arelma stock certificates, was denied based on this Court's decision in *Dole Food Co.*, 538 U.S. 468 (2003), that an individual shareholder does not own a corporation's assets. ROP App. 52a. The claims of the Roxas Estate and the Golden Budha Corporation were denied since (a) their prior judgments were not against Ferdinand Marcos or his Estate, and (b) they failed to prove the assets in the Merrill Lynch account derived from property stolen from them. ROP App. 53a-54a. The Roxas Estate and the Golden Budha Corporation took virtually no discovery during the litigation and attempted at trial to use deposition transcripts from a separate state court action in violation of FRE 804(b)(1), and expert testimony without complying with Rule 26(a)(2). ROP App. 10a-11a.

The Ninth Circuit affirmed the judgment in favor of Pimentel and the Class. ROP App. 11a. Addressing the issue of whether the Republic was an indispensable party, the Ninth Circuit engaged in a *de novo* balancing of the factors set forth in Rule 19(b). ROP App. 4a-10a. Balancing

those factors and applying equity and good conscience, as mandated by the Rule, the Ninth Circuit concluded the Republic was not an indispensable party. ROP App. 10a. The overriding consideration in that Court's opinion was that the Republic had no likelihood of recovering the assets since (a) its claim in the United States would be barred by the applicable statute of limitations and (b) a decision of a Philippine court would not be enforced in a United States court because of a prior decision by a United States court which possessed *in rem* jurisdiction over the interpleaded assets. ROP App. 8a-10a.

The Ninth Circuit rejected the arguments of the Roxas Estate and the Golden Budha Corporation finding the District Court had properly excluded proffered evidence for failure to comply with the Federal Rules of Procedure and the Federal Rules of Evidence. ROP App. 10a-11a. Their remaining arguments were deemed specious by the Ninth Circuit.

The Republic further protracted this litigation and a distribution of $2,000 to thousands of its citizens by filing two motions for reconsideration and *en banc* review. ROP App. 1a. Now, after failing to persuade any of the 27 jurists who have examined its position, the Republic has filed a petition for certiorari with this Honorable Court.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT CORRECTLY APPLIED WELL-SETTLED LAW IN REACHING THE DETERMINATION THAT THE REPUBLIC OF THE PHILIPPINES WAS NOT AN INDISPENSABLE PARTY UNDER RULE 19(b)

A. The Ninth Circuit Properly Engaged in a *de novo* Balancing Pursuant to Rule 19(b) and the *Provident Tradesmens Bank & Trust Co.* Decision

The courts below followed Rule 19(b) of the Federal Rules of Civil Procedure in determining whether the Republic of the Philippines was an indispensable party to the interpleader action:

> ***Rule 19(b). Determination by Court Whenever Joinder not Feasible.*** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment, rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The language of this rule explicitly requires a court to makes its decision "in equity and good conscience" by balancing a series of factors in the context of the dispute needing resolution. *Id.*

In affirming the District Court's ruling, the Ninth Circuit followed this Honorable Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 118 (1968),[5] which instructed courts to look through "the lens of 'equity and good conscience'" and thus to determine indispensability "'in the context of [this] particular litigation.'" *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006); ROP App. 4a-5a. This Court explained in *Provident Tradesmens Bank* that a decision on whether a party is "indispensable" "must be based on *factors varying with the different cases*, some such factors being substantive, some procedural, some compelling by themselves, and some

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[5] The Republic has acknowledged that Justice Harlan's opinion for a unanimous court in *Provident Tradesmens Bank* is the "leading decision on Rule 19(b)." ROP Pet. at 12.

subject to balancing against opposing interests." 390 U.S. at 118-19 (emphasis added). The *Provident Tradesmens Bank* decision notably explained that "[a]fter trial, considerations of efficiency" such as "the time and expense" involved in the trial militate in favor of denying a Rule 19(b) motion. *Id.* at 111. The Ninth Circuit quoted from *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), for the proposition that the "equity" called for in Rule 19(b) requires courts to exercise "flexibility . . . marked by 'mercy and practicality.'" ROP App. 6a.

The Ninth Circuit thus examined the "circumstances and practicalities of the Republic's claim" to determine whether the judgment rendered in its absence "'might be prejudicial to [it] or those already parties.'" ROP App. 4a (*quoting* Rule 19(b)). It then examined two specific scenarios that could follow if the Republic were deemed indispensable, and concluded that "it is doubtful that the Republic has any likelihood of recovering the Arelma assets" because "[t]he res is in the United States" and "[i]t cannot be finally disposed of except by the judgment of a court in the United States." ROP App. 7a-8a. This conclusion was reinforced by the Ninth Circuit's recognition that any effort by the Republic to pursue the Arelma assets in an action against Merrill Lynch in New York would be barred by New York's six-year statute of limitations. ROP App. 8a (*citing* N.Y. C.P.L.R. § 213, and also *citing* *Provident Tradesmens Bank*, 390 U.S. at 115, for the proposition that the Republic's "failure to secure a judgment affecting these assets is a factor to be taken into account"). The Ninth Circuit explained that any judgment the Republic might obtain in the Philippines would be unenforceable, because the Philippine court would have no jurisdiction over the *res* – the Arelma assets – and if a Philippine court were to issue a ruling regarding these assets "a court of this country would not be bound to give it effect." ROP App. 8a.[6] *See also Merrill Lynch, Pierce,*

[6] The conclusion that only a U.S. court can adjudicate claims to assets held in the United States flows from the most basic principles of

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Fenner and Smith, Inc. v. ENC Corp., 467 F.3d 1205, 1207 (9th Cir. 2006), where the Ninth Circuit noted that the Philippine Supreme Court had previously "categorically declared" that its forfeiture proceeding regarding Marcos assets "is *in rem*," citing *Republic of the Phil. v. Hon. Sandiganbayan*, G.R. No. 152154 (Phil. Nov. 18, 2003) and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 482(2)(a) (1987) for the proposition that "any judgment made without proper jurisdiction is unenforceable in the United States."[7] The Ninth Circuit

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due process recognized in all legal systems. As a prominent Philippine writer has explained, Philippine law agrees with these concepts of due process:

> . . . authority to hear and decide cases may be based on a number of factors: the presence, submission, or appearance of the parties or one of them; the doing of certain acts within the State; *the fact that the property involved in the litigation is in the forum*; or the fact that the parties are either citizens or residents of the State. *In the absence of such minimum contacts, a judgment rendered by the court of one State may be refused recognition by other States.*

JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 38 (1979, reprinted 1981) (emphasis added). *See also id.* at 40 (explaining that in an *in rem* action "the State may render through its courts a valid judgment, as long as it has jurisdiction over the thing even though it may not have personal jurisdiction over the persons whose interests are affected"), and at 41-47 (explaining that Philippine jurisdictional principles have evolved from the concepts laid down in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and its progeny).

[7] The Republic's Petition acknowledges that the Philippine Supreme Court has previously declined to render any ruling regarding the Arelma assets (ROP Pet. at 4), but nonetheless contends that this matter "is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court." ROP Pet. at 5. The Philippine courts surely understand, however, that they do not have jurisdiction to render a ruling regarding the Arelma assets, and they are unlikely to issue a ruling that would so flagrantly violate recognized standards of due process and jurisdiction.

The District Court explicitly found as a factual matter that the Republic made no claim for relief regarding the Arelma assets in the 1991 petition filed by the Republic that led to the 2003 decision of the Philippine Supreme Court: "There is no claim in that lawsuit seeking forfeiture of the assets in the Arelma account at Merrill Lynch." ROP

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also noted that the Republic is not bound by the present proceeding, "because it is not a party to the action," and that it is not formally prejudiced, because it remains free to pursue a claim against Merrill Lynch in the United States (although its odds of success are extremely low because of New York's six-year statute of limitations). ROP App. 8a-9a.

The Ninth Circuit completed the balancing process required by Rule 19(b) by concluding that "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it" (ROP App. 9a); that although the Arelma assets are not adequate to satisfy the Human Rights Victims $2 billion award, nonetheless "the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them" (ROP App. 9a); that if this interpleader were to have been dismissed on the basis of indispensability, the Human Rights Victims would have no forum open to them in the Philippines[8] (ROP App. 9a); and that they could sue in New

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App. 56a. The Republic's failure to claim these assets likely resulted from its recognition that no Philippine court could exercise jurisdiction over assets that were in the custody of the United States District Court for the District of Hawaii.

[8] The existence of an adequate alternative remedy for the litigants if an action were to be dismissed is "[p]erhaps the factor most important to a court in determining whether to proceed or dismiss, in the absence of a person who should be joined but cannot be made a party." Jean F. Rydstrom, *Validity, Construction, and Application of Rule 19(b) of Federal Rules of Civil Procedure, as Amended in 1966, Providing for Determination to Be Made by Court to Proceed with or Dismiss Action When Joinder of Person Needed for Just Adjudication Is Not Feasible*, 21 A.L.R. Fed. 12 (1974) § 12(a). The Human Rights Victims are barred from the forfeiture litigation in the Philippines. The District Court specifically found that other parties have no standing to participate in Philippine court forfeiture proceedings between the Republic and the Marcoses (ROP App. 59a), and the Republic has acknowledged this. ROP Pet. at 24 n.10. Due process and equity require that an alternative forum be one in which all parties can participate, not one where just two parties decide how to slice up the money to the exclusion of other claimants.

York but that would impose "a needless repetition that will not benefit the Republic." ROP App. 9a. The Ninth Circuit noted that it would be unrealistic to direct the Human Rights Victims to "find redress from their own government" because – despite the passage of 21 years since Marcos was forced out of office – "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." ROP App. 9a-10a. The Ninth Circuit then concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." ROP App. 9a.

B. Foreign Sovereigns Are Not Entitled to Privileged Status Under Rule 19

The Republic's contention that an assertion of sovereign immunity requires a finding of indispensability is not supported by case law. ROP Pet. at 13. In fact, *the Republic does not cite to a single instance in which a case was dismissed on the basis of a foreign government's assertion of both sovereign immunity and indispensability.*

Numerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties, including, *e.g.*, *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 1058 (N.Y. 2003) (ruling that although a tribe protected by sovereign immunity had interests that would be affected by the litigation, the tribe should not be deemed an indispensable party because that would leave the public with no effective remedy against constitutional violations and other abuses by the executive branch),[9] and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-20 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th

[9] The court explained: "While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court." *Id.* at 1058-59.

Cir. 2003) (ruling that although the immune tribes "can claim a legal interest in this lawsuit," the claim could proceed without them because their interest would be represented by another party). This Court explained in *Provident Tradesmens Bank* why the "deemed conclusive of indispensability" approach advocated by the Republic is misguided, explaining that a court does not know whether a particular party is indispensable until it has examined the situation to determine whether it can proceed without the party: "a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him." 390 U.S. at 119.[10]

The cases involving the immunity of the United States, the 50 states, and Indian tribes cited by the Republic are not analogous to the present situation, because Indian tribes, the 50 states, and the federal government operate within the jurisdiction of the United States and, if a case is dismissed after an assertion of sovereign immunity, other means exist to address and resolve the dispute. In *Dawavendewa v. Salt River Project Agric. Improvement*

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[10] A fact situation somewhat analogous to the present matter is found in *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549 (S.D.N.Y. 2001), which illustrates the pragmatic approach that courts have taken in interpleader actions. The plaintiff law firm brought an interpleader action to determine the proper recipient of settlement funds that had previously been transferred to the firm from the Panama Canal Company after a 1971 collision in the Panama Canal led to the loss of a cargo of rice. The plaintiff law firm named the Socialist Republic of Vietnam along with three foreign corporations as defendant-claimants in the interpleader action. Vietnam asserted its rights to funds, but also asserted its right to immunity as a foreign sovereign under the Foreign Sovereign Immunities Act. *Id.* at 555-56. The court rejected Vietnam's claim of immunity, under the counterclaim and waiver exceptions to sovereign immunity, but also went on to explain that because the court had *in rem* jurisdiction, it would have proceeded with the interpleader, even in Vietnam's absence, and would have been "enabled to determine title under 28 U.S.C. § 1655 and would necessarily award the funds to the Reinsurers, the only parties appearing." *Id.* at 558. This court also ruled that "there is no political question raised in addressing the conflict between the parties." *Id.* at 568.

and Power Dist., 276 F.3d 1150, 1162-63 (9th Cir. 2002), which the Republic cites, the court dismissed the claim only after determining that three potential "viable alternative forum[s]" existed – a suit on behalf of the plaintiff brought by the United States, a suit brought on behalf of the plaintiff by the Equal Employment Opportunity Commission, and a suit by the plaintiff in tribal court. (As explained in Section D below, courts have frequently ruled against an indispensability claim in cases involving claims of immunity by the United States, the 50 states, and Indian tribes, and such evaluations are always fact-specific.) *Id.*

When the litigant is a foreign government outside the jurisdiction of U.S. courts, however, such alternative means to address and resolve the dispute do not exist, and a dismissal of the claim would leave the dispute unresolved. Thus, the fourth Rule 19(b) factor – "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" – becomes crucial. The Human Rights Victims would not have had an adequate remedy if the present interpleader action had been dismissed, and, hence, the lower courts ruled correctly in deciding that the Rule 19(b) factors, taken together, required a conclusion that the Republic was not an indispensable party and that the interpleader should not be dismissed.

The approach sought by the Republic would permit any miscreant foreign sovereign to claim an interest – with little or no evidentiary basis – in a particular litigation in the United States but successively assert sovereign immunity and indispensability to preclude adjudication. In this case, such an approach would further require a federal court with *in rem* jurisdiction over specific assets to abdicate jurisdiction to a foreign court. Such an approach would be inconsistent with the commitment to the rule of law approved by this Honorable Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)).

C. Evaluating the Claim of the Party Seeking "Indispensability" Status Is Necessarily a Part of the Rule 19(b) Balancing Process

The Republic contends that the Ninth Circuit erred in "assessing the strength of the sovereign's claim in the sovereign's absence and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits." ROP Pet. at 17. The Ninth Circuit did not, however, inquire into the merits of the Republic's asserted claim, but instead assumed the validity of the claim and determined that even if it is valid it could not be invoked by the Republic to gain the interpleaded assets because the Republic was barred by the statute of limitations from pursuing this claim. ROP App. 8a. The District Court made the factual finding that the Republic was aware of the Arelma account established at Merrill Lynch since 1986: "The Republic has been aware of the deposit since 1986 when the government of Corazon Aquino was installed," and even had a U.S. court freeze the account at Merrill Lynch in 1987.[11] ROP App. 47a, 56a. At pages 3-4 of its petition, the Republic acknowledges that it was aware of the Arelma assets, but has taken no steps to recover them in the United States, even though it has filed more than a dozen lawsuits regarding other Marcos assets in this country. ROP Pet. at 3-4.

Rule 19(b), the predicate for dismissal, asks whether a necessary party's claim would be "impaired" if the dispute is adjudicated without the "necessary" party. This Court has made it clear that lower courts must evaluate the status of the claim presented by a party as part of its Rule 19(b) balancing process:

To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does

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[11] Obviously, the Republic made no assertion of sovereign immunity when it requested a U.S. Court to freeze the Arelma account at Merrill Lynch. *See* ROP App. 47a.

not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Provident Tradesmens Bank, 390 U.S. at 119. This Court has emphasized that no "litmus test" formula can be applied to the variety of situations controlled by Rule 19(b), and that no test or "generalization" can serve as "a substitute for the analysis required by that Rule." *Id.* at 124.

In order for a party's claim to be "impaired," it must be shown that a "necessary" party has a "legally protectible claim," not merely a potential claim. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (finding that the Indian tribe had a "substantial" interest that "arises from terms in bargained contracts"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

The expiration of the statute of limitations on the Republic's misappropriation claim is a valid basis for concluding the Republic is not an indispensable party. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408 (11th Cir. 1998) (" . . . the provisions for joinder of parties under Rules 19 and 21 are not immune from statutes of limitations."); *Young v. United Steelworkers of America*, 49 F.R.D. 74, 75-76 (E.D. Pa. 1969) (allowing a claim to proceed without a potential defendant who could not be sued because the statute of limitations had run against this defendant, noting that dismissal would leave plaintiff "with *no* remedy, let alone an *adequate* remedy" (emphasis in original) and that no potential prejudice against the absent party had been identified). *See also, Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 86 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

The Ninth Circuit could also have found that the Republic had an adequate alternate remedy. The Republic could pursue its forfeiture claim on the Merrill Lynch account against the Marcoses in the Philippines and, if successful, satisfy its money judgment by execution on the large number of valuable Marcos real properties in the Philippines which have been sequestered by the government for the past 20 years. Pls.' Reply Mem. at 6 (Dkt. No. 312).

D. Many Courts Have Allowed Actions to Proceed Even in the Absence of an Important Party If Equity and Justice So Require

Many courts, in many circumstances, have allowed civil actions to proceed even when important parties are missing. Indeed, it has been noted numerous times that "[i]n general, 'the philosophy of present Rule 19 is to avoid dismissal wherever possible.'" *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 813 n.5 (D.R.I. 1976) (*quoting Heath v. Aspen Skiing Corp.*, 325 F. Supp. 223, 229 (D. Colo. 1971)). This Court has explained that "[a] court of equity will strain hard" to avoid dismissal. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

Many of the cases raising Rule 19(b) issues involve claims brought by Indian tribes, where the United States Government is the missing party, because its sovereign immunity protects it from being brought into the lawsuit against its will. Many courts have allowed such claims to proceed without the United States, and the courts have been particularly influenced by the potential consequence of a contrary ruling – *i.e.*, that the lawsuit could not be pursued, and thus, that the underlying dispute would continue to fester.

In *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the Tenth Circuit, reversing the dismissal of a case involving an Indian tribe, held that tribal sovereign immunity did not necessarily make the Tribe indispensable. That court stated that sovereign immunity does "not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases. (citations omitted.)" *Id.* at 960. Years earlier in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), the Tenth Circuit noted that "[m]ore than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations," and that "[i]f we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and

recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago." *Id.* Even though proceeding with the suit might well require the defendants to undertake "the burden and expense of defending two lawsuits" (*i.e.*, a second one brought by the United States), the court ruled that "the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations." *Id.* Similarly, in *Narragansett Tribe of Indians, supra*, the court allowed an action brought by the tribe against the State of Rhode Island and other defendants to proceed even in the absence of the United States, which could not be sued because of its sovereign immunity. The court concluded that because the "likely consequence that a finding of indispensability herein would effectively deny plaintiff any remedy," it would be improper to find that the United States was an indispensable party and thus exclude the tribe from trying to vindicate its rights. *Id.* at 812-13.

These Indian cases rest to some extent "on the unique protection to be accorded Indian wards," *id.* at 813 (D.R.I. 1976), but it should be noted that Human Rights Victims are also subjects of unique protection under international law because of their well-established right to obtain compensation for their suffering.[12] Indeed, enabling victims of *jus*

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[12] As the Swiss Federal Supreme Court recognized in its 1997-98 decisions transferring Marcos assets to an escrow account controlled by PNB, the duty of a successor government to provide compensation to those whose human rights have been abused by a previous government is firmly established in international law. *In re Federal Office of Police Matters*, No. 1A.87/1997 (Switz. Sup. Ct. Dec. 10, 1997) at 36-39; *see also*, Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(3)(a), 999 U.N.T.S. 171 (which has been ratified by more than 140 countries including the Philippines and the United States) which says that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . ."; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M.

(Continued on following page)

cogens violations of fundamental human rights to receive compensation for their suffering and loss, as required by international law, could well be characterized as serving a public good and falling within the "public rights" exception to the indispensable party requirements. *See Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (weighing the claim of indispensability in light of the "public rights" exception and the fact that the interests of the parties claiming to be indispensable had been protected by other parties in the litigation).

Courts have refrained from dismissing actions even when important parties are missing in many non-Indian cases. In *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967), for instance, the court allowed the action to proceed after determining that joinder was not feasible because there was no alternative forum in which plaintiffs could maintain the action against all interested parties. Among the many other cases that have held similarly include *Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1384 (10th Cir. 1997) (ruling that the United States was not an indispensable party after engaging in a weighing process and emphasizing that "the interests of judicial efficiency counsel strongly against dismissing this action at this point"); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1297-98 (D. Kan. 2002) (ruling that the United States was not an indispensable party after weighing relevant factors, and emphasizing the lack of an

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1027 (1984), *modified*, 24 I.L.M. 535 (1985), stating that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"; *see also, e.g., The Velasquez Rodriguez Case*, 4 Inter-Am. C.H.R. (ser. C) (1988), *reprinted in* 28 I.L.M. 291 (1989) (holding that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation"). The Republic's violation of its obligations under international law to provide remedies to human rights victims must be part of the equation guiding this Honorable Court as it weighs the factors governing applicability of Rule 19(b) of the Federal Rules of Civil Procedure.

alternative remedy for the plaintiff); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (holding that the tribe was not an indispensable party); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (same); *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (same); *Dairyland Greyhound Park, Inc. v. McCallum*, 258 Wis.2d 210, 655 N.W.2d 474 (Wis. 2002) (same).

II. THE NINTH CIRCUIT'S RULING DOES NOT UNDERCUT ANY OF THE REASONS UNDERLYING THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

The Republic presents a "parade of horribles" argument – contending that relations between the United States and the Philippines will deteriorate and that Philippine courts will be reluctant to enforce U.S. court orders if this Honorable Court does not reverse the decision below. ROP Pet. at 11, 25-30. As this Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), however, Congress enacted the Foreign Sovereign Immunities Act in 1976 for the purpose of taking the determination of immunity out of the realm of politics and establishing a "comprehensive" "'set of legal standards'" that "'codifies . . . the restrictive theory of sovereign immunity'" and "transfers the primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 691 (*quoting Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This statute was passed for the purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims *and eliminating political participation in the resolution of such claims*." *Id.* at 699 (emphasis added).

The determination of immunity, and the implementation of such a decision in conjunction with other applicable judicial principles, is thus the responsibility of the judiciary, and the judiciary has fulfilled its responsibility carefully and appropriately in this situation. The U.S. courts have expended substantial resources to the important

claims presented by the Filipino Human Rights Victims during the past 21 years of litigation, including numerous appeals to the Ninth Circuit and applications for certiorari to this Honorable Court during that period.

Earlier in the human rights litigation, the Philippine government submitted an *amicus curiae* brief urging that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and stating clearly that "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief; emphasis in the original brief). The U.S. courts acted in conformity with that request, and, after contentious adjudication, the decision below provides the opportunity to provide modest compensation to the Victims who have suffered so much, and their heirs. This distribution will vindicate transcendent values shared by the United States and the Philippines and, indeed, the entire world community. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467); and *id.* at 728 (recognizing that the Torture Victim Protections Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), has provided "authority that 'establish[es] and unambiguous and modern basis for' federal claims of torture and extrajudicial killing").

Belying the Republic's arguments and recent diplomatic note (ROP App. 65a) regarding the sensitivity of this case are hearings held by the U.S. Congress on March 14, 2007, investigating 295 "extrajudicial" killings in the Philippines, which the U.S. Department of State says are attributable to the Philippine military under the Arroyo administration. In an interview on March 11, 2007, the Philippines National Security Adviser, Norberto Gonzales, said "the inquiry was neither an affront to the country's sovereignty nor a breach of courtesy among nations." *See* "Palace Unfazed by US Hearing on Extrajudicial Killings,"

Philippine Daily Inquirer March 11, 2007, http://newsinfo.inquirer.net (and related articles on March 15 and 16). Surely a country unfazed by U.S. Congressional hearings tying its leadership to mass killings cannot be overly sensitive to a judicial interpleader proceeding determining entitlement to assets of a former president that have been in the United States since 1972. The U.S. Executive Branch has not intervened with its views on this litigation despite being solicited to do so by the Republic, and the Republic's request to have this Court formally seek that Branch's views comes much too late in this litigation and would be unproductive.

III. THE NINTH CIRCUIT'S RULING IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The Republic does not cite one single decision from another circuit dismissing a claim involving a foreign government on the ground that the foreign government is both immune and indispensable. Disputes involving the United States government, the governments of the 50 states, and Indian tribes are different, because if a claim against one of those governments is dismissed, the matter can be resolved within the U.S. political system by other means. But, when a foreign government is involved, a dismissal would mean that the matter would escape resolution.

For 21 years this case has been before the U.S. courts, which carried forth the adjudication of the claims with the express approval of the Philippine government. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief). Earlier decisions of the Ninth Circuit have been cited with approval by this Court. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467). The present decision was handled carefully by the Ninth Circuit, it is not inconsistent with the decisions of any other circuits,

and the fact-specific resolution of this matter presents no issue of national importance.

IV. THE NINTH CIRCUIT PROPERLY DENIED THE CLAIMS RAISED BY THE GOLDEN BUDHA AND ROXAS PETITIONERS

Other petitioners, the Estate of Roger Roxas and the Golden Budha Corporation (the "Golden Budha/Roxas petitioners"), primarily argue that the district court lacked jurisdiction or otherwise erred in distributing the assets to the Class for three independent reasons. The Ninth Circuit fully considered and correctly decided that the petitioners have no claim to the assets at issue (ROP App. 10a-11a).

A. The Probate Doctrine Does Not Bar Federal Jurisdiction to the Assets

The Golden Budha/Roxas petitioners first contend that the district court lacked jurisdiction to distribute the assets because the probate exception to federal jurisdiction reserves such action exclusively to state probate courts. GBR Pet. at 10-17. Indeed, for nine years, the Golden Budha/Roxas petitioners have argued to various courts that the probate exception applies to these proceedings and every court has rejected the argument.

Jurisdiction in this statutory interpleader action was not foreclosed by the probate exception, which prohibits federal courts from probating a will or administering an estate. *Markham v. Allen,* 326 U.S. 490, 494 (1946). This Court has ruled that the probate exception to federal jurisdiction is to be construed narrowly, recognizing that federal courts of equity have jurisdiction to entertain suits "'in favor of creditors, legatees, and heris' [sic] and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (*quoting Waterman v.*

Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). Recently, this Court, in *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735 (2006), further clarified the narrow scope of the probate exception as articulated in *Markham*, explaining that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. *But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*" *Id.* at 1748 (emphasis added) (finding that "the instant case does not fall within the ambit of the narrow exception recognized by our decisions.")

Here, the probate exception does not apply to the Class claims for several reasons. First, the Class claims do not involve purely probate functions, such as the administration of an estate or the probate of a will. Second, the *res* at issue is *not* in the custody of another state or foreign court. In fact, no competing court in the United States or Philippines has ever sought to claim exclusive jurisdiction over the assets in the account. This is particularly compelling because even though Merrill Lynch specifically named Imelda Marcos and several Marcos family members as "defendants" in the interpleader action, none of those individuals ever appeared to claim the assets, and they thus suffered the entry of a default judgment in this matter. Nor did any of the Marcos family members take any subsequent action to have a probate court assert jurisdiction over the assets.

State courts have rejected opening a probate proceeding despite the zealous efforts of the Golden Budha/Roxas petitioners to do so. In *Matter of Estate of Marcos*, 88 Haw. 148, 963 P.2d 1124 (Haw. 1998), the Hawaii Supreme Court expressly rejected the multiple attempts by Irene L. Silverman and the Golden Budha/Roxas claimants to open probate proceedings for the Estate of Ferdinand E. Marcos in Hawai'i following Marcos's death on September 29,

1989.[13] The court highlighted the circuit [probate] court's finding that: "'[T]he property that is the subject of the inquiry in the present petition for reconsideration is not, though it may be in the territorial bounds of the State of Hawai[']i, is not in the Court's opinion, within the state because it is still being held by the United States government.'" 88 Haw. at 151, 963 P.2d at 1127.

Significantly, the Hawaii Supreme Court also examined the successful efforts of the Human Rights Victims to secure assets in proceedings in the District Court for the District of Hawaii such as the recovery of $1,000,000 for the house that Marcos resided in while in Hawaii and the sale at auction of his bullet proof Mercedes. *Id.* at 1128. The Hawaii Supreme Court found that "federal case law dictates that the circuit [probate] court does not have jurisdiction over property in the custody of the federal government." *Id.* at 1132. The Hawaii Supreme Court relied upon *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246, 250 (D. Hi. 1992), where the federal district court held that the circuit court could not exercise *in rem* jurisdiction over property that was in federal custody at the time of the circuit court proceeding.

> We agree with the federal district court and hold that property in the custody of the federal government is not subject to Hawai'i state courts' jurisdiction where the property was in custody at the time of the Hawai'i state court proceeding. Therefore, inasmuch as the property held by U.S. Customs was in federal custody at the time of all of the circuit court proceedings, it may not serve as the jurisdictional basis for a Hawai'i probate proceeding pursuant to HRS § 560:1-301(2).

88 Haw. at 156; 963 P.2d at 1132. Similarly, the assets at issue in Arelma are in the custody of the District Court for

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[13] Silverman and Golden Budha/Roxas also tried to open Marcos probate proceedings in California. The California Court of Appeal ruled there was no evidence that Marcos owned any property in California. *See Matter of Estate of Marcos*, 88 Haw. at 153, 963 P.2d at 1129.

the District of Hawaii, and the Hawaii Supreme Court has already made it very clear that the courts of Hawaii do not have any interest in such assets. Thus, the Hawaii Supreme Court ruled that the District Court for the District of Hawaii is the proper forum for the Class of Human Rights victims to pursue recovery of its judgment against Ferdinand Marcos and his Estate. Golden Budha/Roxas' assertion that a New York court could adjudicate this matter is also baseless. GBR Pet. at 15-16. No New York probate was ever opened nor was one attempted.

It is well established that once a federal court has entered judgment, it has ancillary jurisdiction over subsequent proceedings necessary to "vindicate its authority, and effectuate its decrees." *Peacock v. Thomas,* 516 U.S. 349, 354 (1996) (internal quotations omitted). This authority extends to proceedings to enforce the judgment. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 89 (2d ed. 1984) (Ancillary jurisdiction "include[s] those acts that the federal court must take in order properly to carry out its judgment on a matter as to which it has jurisdiction"). Without ancillary jurisdiction to enforce judgments, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Peacock,* 516 U.S. at 356 (internal quotations omitted). As a result of its entry of judgment for the Class of Human Rights Victims, the U.S. District Court for the District of Hawaii possessed ancillary jurisdiction to enforce the judgment through supplementary proceedings within federal jurisdiction.

Accordingly, the probate exception does not apply to the Class claims and the petition should be denied.

B. The Estate of Marcos Is Not an Indispensable Party To This Action

The Golden Budha/Roxas petitioners next argue that the lower court lacked federal jurisdiction over the assets because the Estate of Marcos is an indispensable party

that was absent from the proceedings. GBR Pet. at 17-18. This argument is baseless.[14]

As an initial matter, contrary to the contention of the Golden Budha/Roxas petitioners, the Estate was, in fact, named as a defendant in the interpleader action. Paragraph 5 of the Amended Complaint for Interpleader alleges that "[u]pon information and belief, Imelda R. Marcos and Ferdinand R. Marcos, Jr. are citizens of the Republic of the Philippines . . . are legal representatives of the Estate of Ferdinand E. Marcos (the "Estate"), and are beneficiaries of the Estate." Am. Compl. for Interpleader at 3 (Dkt. No. 102). Although named in the Amended Complaint and served, neither Imelda nor Ferdinand R. Marcos made an appearance in the proceedings and a default was entered against them. The default has never been contested. Thus, their failure to appear cannot be used as a sword to argue a lack of jurisdiction under Rule 19(b).

These jurisdictional issues are irrelevant as they apply to the Golden Budha/Roxas petitioners, which have failed to prove to any court that they have any direct claim to the assets at issue. The District Court denied their claim to the Arelma/Merrill Lynch assets on the grounds that the judgment that they based their claim upon was solely against Imelda Marcos, in her personal capacity, and not against the Estate of Ferdinand E. Marcos. ROP App. 53a-54a. Because the disputed assets were those of Ferdinand Marcos, and not Imelda, the District Judge ruled that the claim of the Golden Budha/Roxas claimants, "if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840." ROP App. 49a. This ruling is clearly correct. Although they had the opportunity to do so, the Golden Budha/Roxas petitioners introduced no evidence that their assets were stolen by Ferdinand Marcos in 1971 or that the proceeds thereof are traceable to the

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[14] In six years of the interpleader litigation, the Golden Budha/Roxas petitioners have never raised this argument previously, and should be precluded from raising it now, as the issue was not preserved below.

Arelma account at Merrill Lynch. Thus, because they failed to prove a direct claim to the assets at issue, they should be precluded from raising jurisdictional issues.

Furthermore, contrary to petitioners' contention, the Estate is not an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure. Applying the four factor test, it is clear that a judgment rendered in favor of the Class to recover all of the assets in the absence of the Estate caused minimal prejudice, if any, to the Estate and need not be lessened. Indeed, the non-prejudicial effect is evidenced by the non-action of the members of the Marcos Estate's personal representatives, who despite being named as defendants in the interpleader action, have taken no steps to claim the assets or to bring a probate action or to claim that the Estate is indispensable. *See Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998)) (finding that the U.S. was not indispensable and stating "the United States does not want to become a party to the suit, strongly suggesting that its interests will not be impeded if the suit goes forward without it."); *Sokaogon Chippewa Community v. State of Wisconsin, Oneida County*, 879 F.2d 300, 304 (7th Cir. 1989) (finding that the U.S. was not indispensable and stating that the U.S.'s failure to take any position as to its indispensability shows that "it must not fear the consequences of a judgment in this suit."). In fact, a default judgment was entered against them in this action and remains uncontested. Furthermore, petitioners' contention that the distribution of Estate assets in the absence of an estate is *per se* prejudicial is incorrect. GBR Pet. at 18. The judgment rendered in the absence of the Estate was certainly adequate and fair. Even more compelling is the fact that the Class claims could not be effectively litigated in another court. Accordingly, the Estate of Marcos is not an indispensable party and the petition should be denied.

C. The Claims of Pimentel and the Class of Human Rights Victims Were Cognizable in an Interpleader Action

The Golden Budha/Roxas petitioners' third jurisdictional argument contends that Pimentel and the Class of Human Rights Victims have no direct claim to the assets at issue because they are not adverse to a specific identified fund or party. GBR Pet. at 18-23. This argument also is meritless.[15]

The record is clear that Pimentel and the Class filed a timely action for these assets against Merrill Lynch and Arelma on September 6, 2000 asserting (1) that Arelma was the *alter ego* and instrumentality of Ferdinand E. Marcos and his Estate, their judgment debtor, and (2) demanding that the funds in Arelma's account at Merrill Lynch be paid over to Pimentel and the Class. *See Pimentel v. Merrill Lynch*, No. 00-580 (D. Hi. 2000); Dkt. No. 56 at 6. Pimentel and the Class reiterated this claim in their Amended Answer and Claim in Interpleader. Am. Answer and Claim in Interpleader at 4 (Dkt. No. 117). Pimentel and the Class withdrew the action after Merrill Lynch agreed to deposit the assets with the U.S. District Court for the District of Hawaii. Dkt. No. 56 at 5-6. These claims establish the requisite adversity between Pimentel and the Class, on one hand, and Merrill Lynch on the other hand.

For centuries the law has recognized that judgment debtors often try to evade payment of judgments by keeping their assets with a third party. The law is fashioned to

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[15] Neither in their Answers to the Amended Complaint (Dkt. No. 8), nor in the Joint Pretrial Memorandum (Dkt. No. 338), did Golden Budha/Roxas assert that Pimentel and the Class lacked sufficient adversity to Arelma and the fund. Moreover, Golden Budha/Roxas admitted in their Answer that there are conflicting claims to the ownership of the fund. *See* GBR Answer to Am. Compl. at 6 (Dkt. No. 113). The Golden Budha/Roxas petitioners improperly raised this issue for the first time in their appeal to the Ninth Circuit and here, again, even though the issue was not preserved below.

permit judgment creditors to pursue remedies against third parties so that just debts, like the one owing to the human rights victims, can be collected. The cases cited by Golden Budha/Roxas have no bearing on the facts of this case. For example, cases cited by the petitioners involve a plaintiff debtor that requires its general judgment creditor to collect on its judgment against a specific contested fund in an interpleader. *See, e.g., Airborne Freight Corp. v. United States*, 195 F.3d 238, 241-42 (5th Cir. 1999). This Court recognizes the standing of judgment creditors in interpleader actions. *See, e.g., United States v. McDermott*, 507 U.S. 447, 455 (1993). No case holds that a judgment creditor cannot be a proper claimant to an interpleaded fund where that fund can partially or fully satisfy the judgment.

D. The Ninth Circuit's Opinion Did Not Effectively Deny The Golden Budha/Roxas Petitioners' Right To Appeal

The Golden Budha/Roxas petitioners also contend that their right to appeal was denied when the Ninth Circuit failed to address their jurisdictional arguments in its written opinion, thereby purportedly depriving them "of a meaningful right of appeal." GBR Pet. at 23-27. The argument is disingenuous at best.

Even petitioners concede in their brief that the Ninth Circuit did not ignore their submissions. GBR Pet. at 24-26. Rather, in its opinion dated September, 12, 2006, the Ninth Circuit provided a well-reasoned basis for denying the claims of Roxas and Golden Budha, stating in pertinent part:

> The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds and in excluding depositions of fact witnesses from his earlier action against Marcos.

> We do not believe that the district court abused its discretion in either ruling.
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> * * *
>
> As the district court held, Roxas's tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

ROP App. 10a-11a. Having disposed of the Golden Budha/Roxas petitioners' claims on the grounds that they had failed to prove a direct claim or even a factual basis to any of the assets, the Ninth Circuit was not obligated as a matter of law to address every argument that petitioners raised in their brief. *See, e.g., Alaska v. United States*, 545 U.S. 75, 91 (2005); *S.E.C. v. Sloan*, 436 U.S. 103, 109 n.2, 3 (1978). Accordingly, the petitioners' argument is without merit and does not warrant review.

CONCLUSION

The Ninth Circuit followed the law in ruling that the interpleaded assets should be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-1204

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents do not deny the central reality of this case: despite having expressly acknowledged the Republic's claim to the Arelma assets and the validity of its assertion of sovereign immunity, the Ninth Circuit permitted the district court to award those assets to another claimant after adjudicating (and rejecting) the Republic's claim on the merits *in its absence*. In doing so, the court of appeals did more than make it impossible for the Republic to recapture funds that were stolen from it by its former President, interfere with ongoing litigation that is pending in the Philippine courts, and frustrate Philippine domestic policy regarding the appropriate use of assets recovered from former President Marcos; it also defeated the central purpose of the immunity doctrine – preventing foreign sovereigns from having their rights adjudicated against their will in courts of other nations.

The decision below should not stand. It cannot be reconciled with principles of sovereign immunity that have been applied repeatedly by this Court and other courts of appeals. It causes friction in the United States' relationship with an important ally. And, if undisturbed, it will undermine the international system for combating official corruption, which emphasizes the importance of returning misappropriated assets to the country of origin. Indeed, the government of Switzerland recently stated that last point in the strongest terms: it sent a diplomatic note to the United States State Department explaining that the Ninth Circuit's decision in this case discourages international cooperation in recovering stolen assets, runs counter to efforts undertaken by Switzerland to assist the Republic in recapturing assets stolen by Marcos, and negates the Philippines' sovereign interests. Further review by this Court accordingly is warranted.

A. Principles Of Sovereign Immunity Require Dismissal Of A Suit Under Rule 19 When A Sovereign Is A Necessary Party

We showed in the petition (at 13-19) that the Ninth Cir-

cuit's rule cannot be reconciled with fundamental principles of sovereign immunity because it allows a court to adjudicate ownership of property claimed by a sovereign despite the sovereign's assertion of immunity – and to do so based upon the court's *ex parte* assessment of the merits of the sovereign's claim. Respondents have nothing to say in response to this point. Indeed, respondents acknowledge that the Ninth Circuit's test turns on an evaluation of the strength of the sovereign's claim on the merits. Opp. 8-10, 14-15.[1] This approach puts a sovereign to a Hobson's choice: it either appears and participates in the litigation, notwithstanding its sovereign immunity from suit, or it allows the court to dispose of its interests on the basis of its *adversary's* presentation and without the sovereign's involvement. Under this perverse rule, all that the sovereign gets out of its assertion of immunity is exclusion from the proceeding at which its interests are adjudicated.

This case demonstrates the problem in the starkest terms. The Republic has what the Ninth Circuit acknowledged to be a "substantial" claim to the assets at issue. See Pet. App. 40a.[2] The interpleader action here is intended to definitively

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[1] Respondents assert that the Ninth Circuit did not "inquire into the merits of the Republic's asserted claim, but instead assumed the validity of the claim" and held it barred by the New York statute of limitations. Opp. 14. In fact, however, dismissal on statute of limitations grounds *is* a judgment on the merits. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

[2] Actually, the Republic's claim to the Arelma assets is considerably more than substantial. The judgment of the Philippine Supreme Court awarding Marcos' Swiss assets to the Republic demonstrates in considerable detail that Marcos stole those assets from the Republic (see *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003), at 37-51), and the Swiss Federal Supreme Court agreed that the illegal provenance of the assets is beyond reasonable dispute. See, *e.g.*, *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B

determine ownership of those assets. As the Ninth Circuit also acknowledged, the practical effect of the judgment for respondents is to "deprive the Republic of the Arelma assets." Pet. App. 10a. Yet the Ninth Circuit's affirmance of that judgment was expressly based on the court's purported determination that the Republic would not prevail if it litigated its claim to the assets. *Id.* at 7a-9a. That is precisely the sort of determination that principles of sovereign immunity are meant to foreclose. See Pet. 13-19.[3]

65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997). Respondents nevertheless assert that the Republic in this proceeding has not "come forth with evidence that the money at issue belonged to it." Opp. 4. But that is because, in this proceeding, the Republic asserted its sovereign immunity and did not participate on the merits *at all.* Respondents' argument on this point therefore is precisely what is wrong with the Ninth Circuit's rule permitting litigation to continue on the merits after an affected sovereign asserts immunity. Respondents get no further in their complaint (Opp. 4) that PNB and Arelma did not advance evidence supporting the Republic's claim to the assets. As the Ninth Circuit recognized, PNB's interest in the litigation is as an escrow holder of Arelma's shares; pursuant to the escrow agreement, its obligation is simply to dispose of the Arelma assets in accord with the judgment of a Philippine court. See Pet. 3.

[3] This case also demonstrates how an inquiry into the merits can go fatally wrong when the sovereign does not participate. The Ninth Circuit believed that the Republic was not entitled to the Arelma assets because a suit by the Republic against Merrill Lynch would be barred by the New York statute of limitations. Pet. App. 8a. Had the Republic been before the court, it could have pointed out that the state statute of limitations is irrelevant here. The Philippine courts already have determined that they have *in rem* jurisdiction over the assets at stake here (see Pet. 18 n.7), and they also have *in personam* jurisdiction over the parties. If the Republic obtains a favorable judgment to the Arelma assets in the Philippine courts, that judgment will be enforceable in New York. See, *e.g.*, N.Y. C.P.L.R. §§ 5230(b), 5303, 5307, 6201(5). Moreover, Merrill

Respondents nevertheless insist that the Republic's sovereign immunity cannot be dispositive because Rule 19(b) requires in all cases the "balancing of a series of factors." Opp. 7. See *id.* at 8-10, 14-15. But this Court's guidance in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968), makes clear that, in the application of Rule 19(b), some factors are "compelling by themselves" while others are "subject to balancing against opposing interests." See Pet. 12-13. Rule 19 thus "does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist." 390 U.S. at 119. As we explain in the petition, sovereign immunity – given its lengthy historical pedigree and the significance of the values it serves – surely is one of those interests that are "compelling by themselves." Principles long applied by the Court in this context therefore require dismissal of this suit.

B. The Ninth Circuit's Ruling Conflicts With Decisions Of Other Courts Of Appeals

We also showed in the petition (at 19-21) that the Ninth Circuit's ruling cannot be reconciled with decisions of other courts of appeals, which have held that the absence of a "necessary" sovereign requires, or strongly supports, dismissal of the action under Rule 19.[4] Observing that the deci-

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Lynch made quite clear that it would deliver the assets to whoever was held to be their rightful owner by the Sandiganbayan. See Pet. 5 n.3. That should have made recourse to the New York courts altogether unnecessary.

[4] If the appellate and district court decisions invoked by respondents actually agreed with the Ninth Circuit's interpretation of Rule 19, they simply would establish a broader conflict in the lower courts. In fact, however, those decisions do not support the holding below that a "necessary" sovereign may not be indispensable. Of the decisions listed by respondents for the proposition that "[n]umerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties" (Opp. 11),

sions cited in the petition involved the United States, individual states, or Indian tribes, respondents maintain that those cases "are not analogous" to one involving a foreign nation because sovereign domestic entities "operate within the jurisdiction of the United States and, if a case is dismissed after assertion of sovereign immunity, other means exist to address and resolve the suit." Opp. 12. But that distinction is wrong, for several reasons.

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one involved a sovereign Indian tribe that was *not* "necessary" at all under Rule 19(a) because the United States appeared to defend the Tribe's interests (*Artichoke Joe's* v. *Norton*, 216 F. Supp. 2d 1084, 1118-1119 (E.D. Cal. 2002), aff'd on other grounds, 353 F.3d 712 (9th Cir. 2003)); another involved a foreign nation that was subject to suit because it brought a counterclaim and waived its immunity (*Lord Day & Lord* v. *Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 557-559 (S.D.N.Y. 2001)); and the third involved application of New York state joinder law, which differs in its terms from Rule 19(b). *Saratoga County Chamber of Commerce, Inc.* v. *Pataki*, 798 N.E.2d 1047, 1058-1059 & n.9 (N.Y. 2003). Other decisions cited by respondents for the proposition that "many courts, in many circumstances, have allowed civil actions to proceed even when important parties are missing" (Opp. 16; see *id.* at 16-19), are wholly off the point. Some involved tribes that were not necessary parties because the United States participated in the litigation and protected their interests. *Kansas* v. *United States*, 249 F.3d 1213, 1225-1227 (10th Cir. 2001); *Sac & Fox Nation of Missouri* v. *Norton*, 240 F.3d 1250, 1258-1260 (10th Cir. 2001). In others, litigation would not prejudice the absent party. *United States ex rel. Steele* v. *Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 (8th Cir. 1998); *Mescalero Apache Tribe* v. *State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997); *Wyandotte Nation* v. *City of Kansas City*, 200 F. Supp. 1279, 1296 (D. Kan. 2002); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 811-813 & n.5 (D.R.I. 1976). And another did not involve a sovereign at all. *Imperial Appliance Corp.* v. *Hamilton Manufacturing Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967).

For one thing, there were *no* alternative remedies available in any of the cases cited in the petition that held domestic sovereigns indispensable; indeed, some of those decisions specifically noted the *unavailability* of adequate alternative remedies but nevertheless held "dismissal of th[e] suit * * * mandated by the policy of * * * immunity." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). See *Davis* v. *United States*, 343 F.3d 1282, 1293-1294 (10th Cir. 2003). On the other hand, so far as Rule 19(b) is concerned, adequate alternative remedies are no less available when foreign than when domestic sovereigns are involved: under Rule 19(b), "[t]here is no guaranty that the plaintiff can proceed in a court in the United States. The preferred alternative forum may be in a foreign country." 4 *Moore's Federal Practice* § 19.05[5][b], at 19-100 (3d ed. 2006) (citing cases). Most fundamentally, the foreign policy implications of suits impinging upon the interests of other countries means that the immunity of foreign nations is, if anything, entitled to *greater* protection than that of domestic sovereigns. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446 (1979) (more searching inquiry required under the Foreign than the Interstate Commerce Clause).[5] Respondents would turn that principle upside down.

Similarly, we argued in the petition (at 21-24) that, wholly apart from considerations of sovereign immunity, the

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[5] Indeed, one of the decisions relied upon by respondents (Opp. 16) suggests that it is Indian tribal immunity that might be entitled to a lesser level of protection, noting this Court's "statement that the judicial concept of tribal immunity developed 'almost by accident' and the Court's admonition that, at least in the commercial context, the doctrine should be curtailed by Congress." *Davis* v. *United States*, 192 F.2d 951, 960 (10th Cir. 1999). This case, in contrast, does not arise in a commercial setting and involves a doctrine of foreign sovereign immunity that has always been "part of the fabric of our law." *Nat'l City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955).

Ninth Circuit departed from the analysis of *Provident*, the holdings of other courts of appeals, and the policy of Rule 19(b) in its application of the Rule's equitable factors. Respondents make no response at all to this point. For this reason as well, review of the decision below is in order.

C. The Ninth Circuit's Decision Will Discourage International Cooperation In Combating Official Corruption And Cause Friction In The United States' Foreign Relations

Finally, respondents have nothing to say about the most disturbing aspect of Ninth Circuit's decision: it provides the clearest imaginable illustration of the ways in which litigation in United States courts that is intended to settle the rights of a foreign nation may interfere with core sovereign interests. Here, the Republic's interest is profound. As we explain in the petition (at 2-3, 27), the Philippine government has made recovery of assets stolen by former President Marcos an urgent national priority. To counteract the corrosive effects of the pervasive corruption of the Marcos regime, the democratic government of the Republic has pursued continuing litigation in the Philippines' independent court system against the estate of its former President, seeking to recover assets that will be put to the public use that will benefit the broadest range of Philippine citizens.[6]

It is hard to picture a case that is less appropriate for adjudication in this country, or more fraught with the potential to disrupt relations among allies. While the Republic has no

[6] Respondents are simply incorrect in asserting that there was no case pending in the Philippines "seeking determination of the ownership of the Merrill Lynch account." Opp. 4. The Republic has consistently informed both the Pimentel class and the federal courts that its initial forfeiture petition in the Sandiganbayan *did* seek the Arelma assets. See, *e.g.*, ER 0106 (Republic's 1991 petition "covered the Arelma assets, including the funds in the Merrill Lynch account"). Swiss authorities thus required transfer of the Arelma shares to PNB.

objection to its citizens litigating in United States courts to assert claims involving assets actually in the Marcos estate – and said as much in an *amicus* brief filed with the Ninth Circuit in the *Hilao* class action litigation, as respondents now note (Opp. 20; see *Trajano* v. *Marcos*, No. 86-2448 (9th Cir.), Br. of the Republic of the Philippines, 1986 WL 732853) – the Republic has a paramount interest in adjudicating claims of corruption and financial misfeasance by its former President, which is the precise matter at issue here. Not only does the ruling below purport to adjudicate those claims, it does so in favor of other Philippine residents. Most disturbing of all, the Ninth Circuit's decision is explicitly based on its stated disagreement with the democratically elected Philippine government about appropriate priorities for the use of funds recovered from Marcos and the court's belief that a judgment for the Pimentel class here would have "symbolic significance." Pet. App. 9a. It is hard to imagine a less appropriate exercise of the judicial function or a disposition more likely to result in an affront to Philippine sovereign interests.

While that is enough to warrant review of the case by this Court, the importance of the decision below transcends its particular impact on the Philippines. The Ninth Circuit's decision threatens to undermine the broader system of international efforts to combat official corruption by returning misappropriated assets to their country of origin, a policy that is reflected in the United Nations Convention Against Corruption, has been endorsed by the United States, and was effectuated by the decisions of the Swiss Federal Supreme Court returning Marcos-related assets to the Philippines. See Pet. 25 & n.11, 28-30. The decision below will encourage courts to disregard this international preference for the return of assets and make the recovery of stolen funds more difficult.

For just that reason, on April 5 of this year the Swiss government sent a note to the United States Department of State (attached as an appendix to this brief), raising concerns

about the Ninth Circuit's decision and seeking the assistance of the United States in having that decision set aside. The Swiss note explained that "[r]eturning illicit assets to their country of origin through close international cooperation constitutes an important pillar of Swiss policy toward combating the inflow of illegal funds," adding that "Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations of the Marcos regime." App., *infra*, 1a.

The Swiss note therefore concluded:

> Switzerland wishes to highlight that the importance of close cooperation between governments in dealing with the recovery of illicit assets is recognized explicitly by the United Nations Convention on Corruption, which was signed by the United States, the Philippines and Switzerland. The rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the Convention and by Switzerland's own prior actions in assisting the Philippines. In effect, the Merrill Lynch rulings appear to assert that U.S. courts should have a priority in authority over the Philippines in resolving the disposition of Marcos assets, and in doing so seem to negate the Philippines' sovereign interests. For these reasons, Switzerland believes that the court decisions, in their language and result, could make future intergovernmental cooperation in such matters more complicated. Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take all the necessary steps to ensure that the court decisions are reversed or appropriately modified.

App., *infra*, 1a-2a. Given Switzerland's central role in international efforts to repatriate stolen assets, these comments

are entitled to special weight.

Although these considerations were addressed at length in the petition (at 25-30), respondents disregard them entirely. Their only answer to the foreign policy implications of the Ninth Circuit's decision is the statement that the Foreign Sovereign Immunities Act of 1976 was intended to eliminate political considerations from the resolution of assertions of sovereign immunity by foreign nations. We completely agree with that observation. But the FSIA has played its part here: it plainly *accords* the Republic sovereign immunity, as the Ninth Circuit recognized. See Pet. App. 33a-39a. The problem, of course, is that the court of appeals proceeded to wholly vitiate that immunity as a practical matter through its misapplication of Rule 19(b).

If there is any uncertainty about the practical implications of this decision, the Court could seek the views of the United States. But as we suggested in the petition, the nature of the proceeding here should leave no doubt about either the error of the Ninth Circuit's legal analysis or the destructive impact of its decision. The holding below frustrates the application of Philippine law, precludes the Republic from recovering stolen assets, undermines broader international efforts to fight official corruption, and serves as a considerable irritant to the United States' relations with other nations. It should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APRIL 2007

APPENDIX

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the U.S. Department of State and has the honor of communicating that Switzerland requests the assistance of the United States in relation to the case of *Merrill Lynch v. ENC Corp. et al.*, as reported at 446 F.3d 1019, 464 F.3d 885, and 467 F.3d 1205, and which is now the subject of a petition for certiorari to the U.S. Supreme Court under the name *Republic of the Philippines v. Pimentel*, No. 06-1204. In the Merrill Lynch case, an interpleader action involving assets previously sent to the United States by Ferdinand Marcos, the Court of Appeals for the Ninth Circuit held that the participation of the Philippines was not indispensable to determining ownership of the assets and affirmed the award of those assets by a U.S. District Court to a class action group of Philippine citizens.

Returning illicit assets to their country of origin through close international cooperation constitutes an important pillar of the Swiss policy toward combating the inflow of illegal funds. Accordingly, Switzerland has cooperated closely and successfully with the Philippines on the return of the assets of Ferdinand Marcos. Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations under the Marcos regime. Ultimately, Switzerland returned assets valued at approximately $600 million, with the understanding that the Philippines, in dealing with the claims of the class action plaintiffs group, would follow procedures consistent with the United Nations Convention Against Torture and the United Nations International Covenant on Civil and Political Rights - Pact II.

Switzerland wishes to highlight that the importance of close cooperation between governments in dealing with the recovery of illicit assets is recognized explicitly by the

United Nations Convention on Corruption, which was signed by the United States, the Philippines and Switzerland. The rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the Convention and by Switzerland's own prior actions in assisting the Philippines. In effect, the Merrill Lynch rulings appear to assert that U.S. courts should have a priority in authority over the Philippines in resolving the disposition of Marcos assets, and in doing so seem to negate the Philippines' sovereign interests. For these reasons, Switzerland believes that the court decisions, in their language and result, could make future intergovernmental cooperation in such matters more complicated. Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take all the necessary steps to ensure that the court decisions are reversed or appropriately modified.

The Embassy of Switzerland avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

Washington, D.C., April 5, 2007

United States Department of State
Washington, D.C.

Reply Brief Unavailable for Filming at this Time

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Nos. 06-1039 & 06-1204

In the Supreme Court of the United States

ESTATE OF ROGER ROXAS, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

REPUBLIC OF THE PHILIPPINES, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This interpleader action was brought to settle ownership of certain assets allegedly misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed by several parties, including the Philippines (which under Philippine law is the owner of property acquired through the misuse of public office by Philippine officials), a class of judgment creditors of the Marcos estate, and a judgment creditor of Marcos's wife, Imelda Marcos.

In No. 06-1204, *Republic of the Philippines* v. *Pimentel*, the question presented is:

Whether a foreign sovereign that is a necessary party to a lawsuit under Fed. R. Civ. P. 19(a) and has successfully invoked sovereign immunity is, under Rule 19(b), an indispensable party to an action brought in the courts of the United States to settle ownership of assets claimed by that sovereign.

In No. 06-1039, *Estate of Roxas* v. *Pimentel*, the questions presented are:

1. Whether the probate exception to federal court jurisdiction eliminated the district court's jurisdiction over the action.

2. Whether the district court should have dismissed the case because the Estate of Ferdinand Marcos was an indispensable party to the action.

3. Whether the district court lacked jurisdiction over the action because the Pimentel claimants presented no ownership or lien claim against the fund.

4. Whether the court of appeals violated petitioners' right to appeal by failing to address certain of petitioners' arguments.

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4 James Wm. Moore et al., *Moore's Federal Practice* (2006) 10, 15
7 Charles Alan Wright et al., *Federal Practice and Procedure* (2001) 10, 16, 17

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the views of the United States. In the United States' view, the petition for a writ of certiorari in No. 06-1204 should be granted, and the petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

STATEMENT

1. Ferdinand Marcos was President of the Republic of the Philippines (Philippines) for nearly 20 years. In 1972, Marcos created Arelma S.A. (Arelma) under the laws of Panama. Pet. App. 43a.[1] That same year, an account in the name of Arelma was opened at Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) in New York. *Id.* at 45a. The funds placed into that account were allegedly obtained by Marcos through misuse of his public office. *Ibid.*; ER 106, 174-251. Ownership of Arelma is represented by two bearer share certificates that are held in escrow by the Philippine National Bank (PNB), after being transferred there by an order of the Swiss Federal Supreme Court. Pet. App. 43a, 46a, 49a.

The assets in the Merrill Lynch account are the subject of this interpleader action. Arelma claims the assets based on its ownership of the account; PNB's claim is based on its custody of the Arelma bearer share certificates. The Philippines and the Philippine Presidential Commission on Good Government (PCGG) claim the funds under a Philippine statute (Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955)) providing that any property acquired by a public officer through misuse of his office is forfeited to the government *ab initio*.

Respondent Mariano Pimentel represents a class of human rights victims (Pimentel claimants) who obtained a $2 billion judgment against the Marcos estate in February 1995. See *Hilao* v. *Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). The

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[1] Unless otherwise noted, references to "Pet. App." are to the appendix in No. 06-1204. Arelma, S.A. is named in this action as Arelma, Inc. Pet. App. 43a.

Pimentel claimants seek to execute that judgment against the Merrill Lynch account, claiming that Arelma was a shell created to hide Marcos's personal assets. Br. in Opp. 3, 5.

Petitioners Estate of Roger Roxas and Golden Budha Corporation (Roxas claimants) obtained a $19 million Hawaii state court judgment against Imelda Marcos, Marcos's wife, in October 1996, based on claims of torture, imprisonment, and theft of a treasure owned by Roxas. See *Roxas* v. *Marcos*, 969 P.2d 1209, 1231-1233 (Haw. 1998). The Roxas claimants seek to execute their judgment against the Arelma account, and further claim that the money used to fund the Arelma account derives from the stolen Roxas treasure. Pet. App. 31a; 06-1039 Pet. App. 73a-77a.

2. After Marcos's rule ended in 1986, the Philippine government created PCGG to recover Marcos's illegitimate wealth, much of which had been removed from the Philippines. ER 110. In April 1986, PCGG made a request to the Swiss government for mutual assistance, seeking return of Marcos's assets, including the Arelma shares. ER 288, 313. The Swiss government froze those assets and the Swiss Federal Supreme Court upheld the freeze in 1990. ER 348-349.

In 1991, PCGG commenced a forfeiture proceeding against Marcos in the Sandiganbayan, a Philippine court with jurisdiction over political corruption cases, based on the Philippine statute providing for forfeiture of property obtained through misuse of public office. ER 174-251.

In late 1997 and early 1998, while the forfeiture action was pending, the Swiss Federal Supreme Court transferred the frozen assets to an escrow account at PNB pending a final ownership determination by the Philippine courts. ER 289, 347-385. After the Swiss assets were transfered to the PNB escrow account, ER 157-160, PCGG asked Merrill Lynch to transfer the assets it held for Arelma to that account, ER 162, 387. Merrill Lynch declined, noting that the transfer of the

Arelma shares to PNB was provisional only, and that there were a number of other claimants to the fund. ER 393-395.

On September 19, 2000, the Sandiganbayan granted PCGG's motion for partial summary judgment, holding that the assets at issue in the motion were forfeited to the Philippines under Philippine law. ER 254-283. Although the Sandiganbayan later reversed its own decision, the Philippine Supreme Court reinstated the partial judgment in the Philippines' favor on July 15, 2003. ER 597-696.

3. On September 14, 2000, Merrill Lynch commenced this interpleader action in federal district court in Hawaii to settle competing claims to the Arelma account's assets. ER 34. As required by 28 U.S.C. 1335(a), Merrill Lynch deposited the account's assets, $35 million, with the court. Pet. App. 46a.

The Philippines and PCGG asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, and moved to dismiss the interpleader action, claiming that their unavailability required dismissal under the rules for compulsory joinder. See Pet. App. 31a-32a; Fed. R. Civ. P. 19(b). The district court instead dismissed the claims of the Philippines and PCGG on the merits, without addressing their claim of sovereign immunity. Pet. App. 32a.

On October 31, 2002, the court of appeals held, on interlocutory appeal, that the Philippines and PCGG were immune from suit in the interpleader proceedings under the FSIA. Pet. App. 36a-39a. The court also found the Philippines and PCGG to be necessary parties who should "be joined if feasible" under Rule 19(a), since "[w]ithout the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected." *Id.* at 40a. While the court noted that the Philippines' and PCGG's unavailability militated in favor of dismissal under Rule 19(b), it also recognized that the Pimentel claimants and Merrill Lynch had competing interests. *Id.* at 41a. Rather than resolve that conflict, the court noted that Merrill Lynch, the Philippines, and

PCGG had agreed to a stay of the interpleader suit pending resolution of claims in the Philippines. *Id.* at 42a. The court ordered entry of a stay, noting that "later developments may render it more equitably feasible for proceedings to go forward in this case," such as "resolution of the litigation in the Philippines" or a change in the parties' immunity status. *Ibid.*

On June 20, 2003, the district court vacated the stay, concluding that the outcome of the proceedings before the Sandiganbayan would not affect the interpleader action because the district court had exclusive jurisdiction over the Arelma assets. ER 697-699. On February 20, 2004, the court of appeals affirmed the lifting of the stay. ER 779-782.

On August 14, 2003, while the appeal from the order lifting the stay was pending, the district court denied the Philippines and PCGG's motion to dismiss the case under Rule 19(b). Pet. App. 55a-60a. The court held that the Philippines and PCGG did not have a "legally protectible claim" that would be impaired by the proceedings because any claim they might have would be barred by New York's statute of limitations. *Id.* at 57a-59a. The court also rejected the claim that the disputed assets were implicated by the just-concluded forfeiture proceeding in the Philippines. The court found that the forfeiture petition filed in 1991 did not "seek[] forfeiture of the assets in the Arelma account at Merrill Lynch," and that the Philippine Supreme Court decision made no mention of Arelma or the Arelma account at Merrill Lynch. *Id.* at 56a.[2] The court further found a lack of proof that the Philippines and PCGG had claimed ownership of the Arelma share certificates. *Ibid.* The court concluded that, in any event, "[o]wnership of the Arelma share certificates is irrelevant to this proceeding since Arelma is a party actively seeking control of the assets at

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[2] The Philippines and PCGG contend that the 1991 forfeiture petition did in fact seek forfeiture of the Arelma shares and its assets. 06-1204 Pet. 4. The forfeiture petition does refer to Arelma and the Merrill Lynch account, though not in the context of a specific request for forfeiture. ER 234.

issue and Arelma's shareholders have no standing to pursue assets allegedly belonging to the corporation." *Id.* at 57a.

The district court held a bench trial to adjudicate the remaining claims to the Arelma account, and on July 12, 2004, awarded the entirety of the Arelma assets to the Pimentel claimants. Pet. App. 43a-54a. The court noted that the Pimentel claimants' judgment was against Marcos personally, rather than Arelma. *Id.* at 49a. However, the court found that because Arelma was merely the "*alter ego* and instrumentality of Ferdinand E. Marcos," it could "reverse" pierce the corporate veil and find that the proceeds of the account held at Merrill Lynch were in fact owned by Marcos. *Id.* at 52a, 54a. For the same reason, the court rejected the separate claim of Arelma to the funds. *Id.* at 54a.

The district court also rejected the claims of the other claimants. It found that PNB "lack[ed] standing" to claim the assets in its capacity as escrow holder of the Arelma shares because "[a]n individual shareholder, by virtue of ownership of shares, does not own the corporation's assets." Pet. App. 52a (quoting *Dole Food Co* v. *Patrickson*, 538 U.S. 468, 475 (2003)). The court also rejected the claim of the Roxas claimants, finding that they had not proved that the assets in the Arelma account derived from property stolen from Roxas, and that their claims were, in any event, inferior to those of the Pimentel claimants. *Id.* at 49a, 53a-54a; ER 944.

4. On July 19, 2004, the Philippines and PCGG filed a motion with the Sandiganbayan, as part of the forfeiture proceedings begun in 1991, claiming that the "ARELMA account is now ripe for forfeiture." See Request for Judicial Notice, Ex. A at 9. It thus prayed that "judgment be rendered declaring the funds, properties, shares in and interests of ARELMA, wherever they may be located, as ill-gotten assets and forfeited in favor of the Republic of the Philippines." *Ibid.* That motion is still pending before the Sandiganbayan.

5. The Philippines and PCGG appealed the denial of their motion to dismiss under Rule 19(b). Arelma, PNB, and the Roxas claimants appealed the award of the assets to the Pimentel claimants. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that in "the usual case of interpleader" a sovereign party that cannot be joined due to immunity "is indispensable and so can cause dismissal of the action." *Id.* at 6a. Here, however, the court held that other factors outweighed the Philippines' and PCGG's immunity.

The court of appeals found that the Philippines' failure to obtain a judgment in the Philippines as to the ownership of the assets, even though the Arelma shares had been in escrow at PNB since 1995, was "an equitable consideration * * * to be taken into account." Pet. App. 7a. The court recognized that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. But the court concluded that the Philippines would not be prejudiced by the interpleader action because "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Id.* at 7a. The court reasoned that any action by the Philippines against Merrill Lynch would be barred by New York's six-year statute of limitations for actions based on misappropriation of public property. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)).

Responding to the Philippines' contention that "it could obtain a judgment regarding the ownership of these assets in the Philippines where it is relieved of any statute of limitations," the court of appeals concluded that the Philippine courts "would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. Accordingly, if a Philippines court issued such a judgment, a court in this country "would not be bound to give it effect," and the assets could not be "finally disposed of except by judgment of a court in the United States." *Id.* at 7a-8a.

In considering the adequacy of the judgment in the absence of the Philippines and PCGG, the court found that the award would have some "symbolic significance" to the "victims of the former president of the Republic." Pet. App. 9a. Although most of the Pimentel claimants were Philippine citizens who "should find redress from their own government," the court found that consideration to be "outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the[ir] president." *Id.* at 9a-10a. The court also concluded that the Pimentel claimants would have no forum in the Philippines in which to raise their claims to the Arelma assets. *Id.* at 10a.

After balancing the factors, the court of appeals concluded that "[n]o injustice" would be done to the Philippines "if it now loses what it can never effectually possess." Pet. App. 10a. The court therefore affirmed the award of the Arelma assets to the Pimentel claimants, and also rejected claims of error raised by the Roxas claimants. *Id.* at 10a-11a.

DISCUSSION

The Ninth Circuit's indispensibility analysis under Rule 19(b) was flawed in significant respects. The court gave insufficient weight to the absent parties' sovereign immunity from suit, and improperly (and incorrectly) prejudged the merits of the immune parties' claims. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals. The decision also raises significant concerns with respect to the Nation's foreign relations. It prejudices ongoing litigation in the Philippines regarding a matter of great public concern to that country, conflicts with an understanding between the Philippines and Switzerland regarding adjudication of the Marcos assets, and threatens to undermine the ability of the United States to enforce its forfeiture judgments abroad as well as to assert sovereign immunity in foreign courts in similar circumstances. The United States therefore recommends

that the certiorari petition filed by the Philippines and PCGG (No. 06-1204) be granted, and that the petition in No. 06-1039 be held pending disposition of No. 06-1204.

I. THE COURT OF APPEALS' APPLICATION OF RULE 19(b) WITH RESPECT TO IMMUNE ABSENT PARTIES WARRANTS THIS COURT'S REVIEW

Federal Rule of Civil Procedure 19 provides for mandatory joinder of persons "needed for just adjudication." Rule 19(a) describes persons who must be joined in an action if feasible. For example, under Rule 19(a)(2)(i), if a person "claims an interest relating to the subject of the action" and "disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," that person must be joined.

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party thus being thus regarded as indispensable." Rule 19(b) includes four "factors" to consider in such a case:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"The decision whether to dismiss * * * must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118-119 (1968) (*Provident Bank*).

In its first opinion in this case, the court of appeals held that the Philippines and PCGG are immune from jurisdiction under the FSIA. Pet. App. 30a-39a.[3] The court further held that the Philippines and PCGG are parties that should be joined if feasible, and that it was "difficult to see how this interpleader action can proceed in their absence." *Id.* at 40a-41a. On that basis, the court of appeals entered a stay pending future proceedings in the Philippines. *Id.* at 42a.

Later, however, the court of appeals concluded that the absence of the Philippines and PCGG did not require that the interpleader action be stayed or dismissed under Rule 19(b). Pet. App. 6a-10a. That decision failed to take appropriate account of the fact that the Philippines' and PCGG's absence is due to their immunity from suit, and was premised on other legal errors as well. Its ruling, which conflicts with the approach of other courts of appeals and interferes with significant foreign policy interests, warrants this Court's review.

A. The Immunity Of An Absent Party Is A Very Significant Consideration In The Analysis Under Rule 19(b)

This Court has recognized the importance of sovereign immunity to the Rule 19 analysis in cases where the United

[3] Respondents do not challenge the determination that the Philippines and PCGG have immunity to this interpleader action. We note that in *Cory* v. *White*, 457 U.S. 85 (1982), the Court held that the Eleventh Amendment barred an interpleader suit seeking "resolution of inconsistent tax claims by the officials of two States." *Id.* at 86, 91. In two more recent cases, *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), and *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court held that the Eleventh Amendment did not bar a federal court from exercising in rem jurisdiction with respect to a bankruptcy estate or a shipwrecked vessel. In both cases, however, the Court's analysis emphasized the fact that the district court was exercising in rem jurisdiction pursuant to a specific constitutional grant of federal authority over the res. *Hood*, 541 U.S. at 446-451 (bankruptcy); *Deep Sea Research*, 523 U.S. at 501, 506-507 (admiralty). Here, in contrast, there is no specific constitutional grant of authority over the res, and the federal court's power to adjudicate the claims therefore stems solely from its jurisdiction over the claimants, as to which a party may assert its immunity.

States is the absent party. See *California* v. *Arizona*, 440 U.S. 59 (1979); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945); *Minnesota* v. *United States*, 305 U.S. 382, 386-388 (1939); see also 7 C. Wright et al., *Federal Practice and Procedure* § 1617, at 254 (2001) (Wright & Miller) ("No doubt because of the sovereign-immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests."); 4 J. Moore et al., *Moore's Federal Practice* § 19.05[2][c] at 19-91 (2006) (*Moore's*) ("[C]ourts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit.").

Similarly, a number of courts of appeals have held that an absent party's sovereign status is entitled to special weight under Rule 19(b). For example, in dismissing a suit where the absent party was an Indian Tribe, the D.C. Circuit stated: "This is not a case where some procedural defect such as venue precludes litigation of the case. Rather the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (1986); see *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir.) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"), cert. denied, 502 U.S. 818 (1991); *Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (where "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves") (internal quotation marks omitted).

That is not to suggest that an immune sovereign is automatically indispensable. For instance, in some cases the interests of the absent sovereign may be properly and adequately protected by the parties remaining in the suit, and in

others relief may be structured so as not to prejudice the absent party. See, *e.g.*, *Wichita & Affiliated Tribes*, 788 F.2d at 774; cf. *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912) (finding that interests of absent Indian grantors were adequately represented by the United States). But even though the Philippines' and PCGG's immunity was not in itself outcome determinative under Rule 19(b), it should have received far greater weight than it did. Indeed, the court of appeals recognized that its analysis conflicts with the approach of other courts of appeals on this issue. See Pet. App. 61a-62a.

B. The Court Of Appeals' Rule 19(b) Analysis Was Flawed In Other Respects As Well

1. Central to the court of appeals' reasoning concerning the first factor in Rule 19(b) was its conclusion that the Philippines and PCGG would not be prejudiced by a judgment rendered in their absence because they had "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. The court found that any claim by the Philippines to the assets would be barred by New York's six-year statute of limitations for misappropriation of public funds. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)). By resting its analysis so heavily on its assessment of the merits of the Philippines' and PCGG's claims, the court in effect deprived them of the benefit of their sovereign immunity.

While this Court has not ruled out consideration of the underlying merits of a claim in the course of determining the extent of prejudice to an absent party from adjudication without his participation, see *Provident Bank*, 390 U.S. at 115 (noting that it would have been proper to explore the likelihood that claims against the absent party would result in recoveries against him and therefore claims by him against the fund), it is particularly problematic for a court to assess the merits of an absent party's own claim when the party's absence is due to its sovereign immunity from the court's juris-

diction. The immune party would either have to participate in the litigation (despite its immunity) in order to argue the merits of its claim, or risk the possibility that the court will, as here, underestimate the strength of the party's interest and evaluate the absent sovereign's claim based on the arguments of the present and hardly disinterested other litigants.

In this case, moreover, the lower courts' assessment of the strength of the immune parties' interests was mistaken. Contrary to the court of appeals' assumption that the Philippines would have to sue Merrill Lynch in New York court to litigate its claim that Marcos obtained the assets illegally, that claim by the Philippines can properly be litigated in a Philippine court. The Philippines' claim to Arelma and its assets is based on Philippine law providing that property misappropriated by public officers through abuse of their office is forfeited to the Philippines from the moment it is obtained. Pet. App. 2a-3a. A special Philippine court—the Sandiganbayan—is vested with authority to adjudicate disputes under that statute. Indeed, the Philippines and PCGG are presently seeking forfeiture of the Arelma shares and Arelma's assets in that court, and a fully briefed motion for summary judgment with respect to those assets is pending before it.

If the Sandiganbayan awards the Arelma shares and assets to the Philippines, there is no reason to assume that the Philippines would have to sue Merrill Lynch to obtain the assets in Arelma's Merrill Lynch account. Rather, the Philippines, either directly or through Arelma, would simply request that Merrill Lynch transfer the assets in Arelma's account to an account in the Philippines. If Merrill Lynch were to refuse, the Philippines (or Arelma) might have to bring suit, but the suit would be based on that new breach of contract, not on the underlying claim (already adjudicated by the Sandiganbayan) that Marcos obtained the original assets illegally.

The court of appeals believed that "a court of this country would not be bound to give * * * effect" to a judgment by

the Sandiganbayan regarding ownership of the Arelma account and its assets because "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. The court erred in announcing so categorical a rule regarding a claim that would be better evaluated when a U.S. court has before it an actual judgment by a Philippine court. It is unnecessary for this Court to decide whether a court in the United States would *always* be bound by a foreign court's judgment of forfeiture. It is sufficient to recognize that the court's categorical rule that United States courts would *never* enforce a foreign judgment of forfeiture relating to assets located in the United States is erroneous.

There are without question instances in which a foreign judgment of forfeiture relating to assets located in the United States may be recognized and enforced by a court here. Indeed, a federal statute specifically provides for enforcement of foreign judgments of forfeiture in certain circumstances. See 28 U.S.C. 2467(c) (upon certification by the Attorney General, "the United States may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States"). Further, the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT), Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995), and chapters IV and V of the United Nations Convention Against Corruption, G.A. Res. 4 (LVIII), U.N. Doc. A/RES/58/4, at 22, 32 (2003), contemplate cooperation by the two countries on proceedings related to asset forfeiture.

The MLAT, for example, generally requires the parties, as permitted by their domestic law, to assist each other when the object of a forfeiture proceeding in one country is located within the other country. The MLAT presupposes the existence of jurisdiction of Philippine courts over assets located

in the United States, and vice versa. And, in fact, courts in the United States do sometimes exercise jurisdiction in civil forfeiture proceedings over property located outside the United States. See 28 U.S.C. 1355(b)(2) ("Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, * * * an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.") (footnote omitted).[4]

Moreover, even assuming arguendo that the Philippine courts could not adjudicate ownership of the actual assets held in the Merrill Lynch account, it is undisputed that the Philippine courts have jurisdiction to determine the ownership of Arelma itself, as the share certificates are being held in escrow in the Philippines. If ownership of Arelma were awarded to the Philippines by the Sandiganbayan, there is no reason to assume, as the court of appeals did, that a court in the United States would refuse to recognize that judgment.

The court of appeals' analysis of the first Rule 19(b) factor also failed to take into account the logical priority of the Philippines' and PCGG's claims over those of the Pimental claimants. The Pimentel claimants do not assert that they are the rightful owners of the assets in Arelma account. Rather, as holders of a judgment against the Marcos estate, the Pimentel claimants ask the court to ascribe the Arelma assets to the Marcos estate through "'reverse piercing' of the corporate veil," and then to award those assets to them in partial satisfaction of their judgment against the Marcos estate. Pet. App. 52a. Thus, the Pimental claimants' claim depends upon a determination that the assets are really Marcos assets. If the Sandiganbayan determines that Arelma and its assets are

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[4] If the Philippine judgment did not qualify for enforcement under Section 2467(c), there would be a further question whether the judgment would qualify for recognition under principles of international comity. See *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895).

forfeited under Philippine law, it would mean that those assets have been owned by the Philippines since the time Marcos first obtained them.[5] The claims of the Pimentel claimants against those assets would thereby be vitiated. They would then be seeking to execute a judgment that they possess vis-a-vis *Marcos* against assets of the *Philippines*.

2. The court of appeals' erroneous conclusion that the Philippines would not be prejudiced by continuation of the interpleader action led it to give no consideration to the second Rule 19(b) factor: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Pet. App. 9a. This case involves mutually exclusive claims to a common fund: the Philippines and PCGG claim the entire amount as property of the Philippines, the Pimentel claimants' judgment far exceeds the value of the Arelma assets, and the Roxas claimants' judgment represents over half the amount of the assets. In such a situation, as the court of appeals recognized in its initial ruling, *id.* at 40a, it would be nearly impossible to shape relief so as to avoid harm to the absent parties. See *Provident Bank*, 390 U.S. at 115; see also 4 *Moore's* § 19.05[3], at 19-94 to 19-95 (noting possibility of partial distribution of undisputed portion of fund or requiring that security be posted for the disputed amount).

3. The court of appeals also misinterpreted the third Rule 19(b) factor—"whether a judgment rendered in the person's absence will be adequate." The third factor "refer[s] to the

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[5] Such a ruling would be consistent with well established domestic forfeiture law. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for example, provides that "[a]ll right, title, and interest in [forfeited] property * * * vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C. 1963(c). See also 18 U.S.C. 981(f); 21 U.S.C. 853(c). Congress, in RICO, "devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit property to the United States." *United States* v. *BCCI Holdings (Lux.), S.A.*, 46 F.3d 1185, 1191 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995).

public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U.S. at 111; see *Davis ex rel. Davis* v. *United States*, 343 F.3d 1282, 1292-1293 (10th Cir. 2003), cert. denied, 542 U.S. 937 (2004). That factor "promotes judicial economy by avoiding going forward with actions in which the court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined." 7 Wright & Miller § 1608, at 114.

Rather than focusing on "the public stake in settling disputes by wholes," the court of appeals considered only whether the judgment would be adequate to the "victims of the former president of the Republic" by satisfying a small portion of their $2 billion judgment. Pet. App. 9a. But, it is clear that the court's judgment would not satisfy "the public stake in settling disputes by wholes." Indeed, the court of appeals recognized that because "any judgment entered in this action cannot bind the Republic," the Philippines and PCGG "would remain free to sue for the Arelma assets in a forum of [their] choice." *Id.* at 8a. The court even suggested that "the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested." *Id.* at 8a-9a.

That reasoning directly contravenes the purposes of both Rule 19 and interpleader. This Court has noted that where multiple parties "assert conflicting claims to a common fund," a suit by any one of those parties "implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-738 (1977); see 7 Wright & Miller § 1618, at 274-275 ("When a particular fund

or property right is involved in litigation, federal courts must be especially sensitive to the danger of contradictory judicial orders relating to that fund or right.").

Interpleader is likewise intended to allow a party faced with multiple claims to a res to avoid multiple liability by resolving the controversy in a single consolidated proceeding. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 533 n.15, 534 n.16 (1967) ("the classic situation envisioned by the sponsors of interpleader" was one where the stakeholder was "faced with conflicting but mutually exclusive claims to a policy"); 7 Wright & Miller § 1702, at 534-535. As the court of appeals recognized in its earlier decision, "[w]ithout all significant claimants in an interpleader action, its purpose is materially frustrated." Pet. App. 41a.

4. As a number of courts have recognized, the fact that a party is absent due to its immunity from suit largely obviates the fourth factor in the Rule 19(b) analysis—"whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." "[T]he plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-1294; see *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48 (2d Cir. 2004), cert. denied, 126 S. Ct. 2351 (2006); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 480-481 (7th Cir. 1996); *Wichita & Affiliated Tribes*, 788 F.2d at 777. That is especially so in this case, because the Pimentel claimants assert an interest only as judgment creditors, not as persons claiming ownership of the assets, and because the vast majority of the Pimentel claimants are Philippine citizens who, as the court of appeals recognized, ordinarily "should find redress from their own government." Pet. App. 9a.

Indeed, the Ninth Circuit itself has repeatedly held that the lack of an adequate alternative remedy for a plaintiff is less significant when the absent party is immune from suit,

because the inability to bring suit is a "common consequence of sovereign immunity, and the [immune party's] interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *American Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (2002); see *Wilbur* v. *Locke*, 423 F.3d 1101, 1115 (2005), cert. denied, 546 U.S. 1173 (2006); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162, cert. denied, 537 U.S. 820 (2002); *Confederated Tribes of the Chehalis Indian Reservation* v. *Lujan*, 928 F.2d 1496, 1500 (1991).

Here, the court of appeals acknowledged that sovereign status of the absent party is a "powerful consideration" in indispensability analysis. Pet. App. 7a. However, contrary to its own circuit precedent, it placed heavy emphasis on the fact the Pimentel claimants would have "no forum within the Philippines open to their claims," *id.* at 10a, giving no consideration to the competing interest of the Philippines and PCGG in maintaining their sovereign immunity.

C. The Court Of Appeals' Decision Threatens To Impair The Nation's Foreign Policy Interests

The court of appeals' decision threatens to undermine significant interests of the United States. The United States has a strong interest in the proper application of principles of foreign sovereign immunity, a matter of great sensitivity in foreign relations both because of its impact on foreign states and because of the United States' own interests relating to reciprocity. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). More particularly, the United States has an interest in ensuring that property to which it has a significant claim will not be awarded to others by a foreign court that has no jurisdiction over the United States because of sovereign immunity. And the United States has an interest in cooperating with foreign governments in their efforts to repatriate assets misappropriated by their former leaders.

This case itself reflects such international cooperation in the agreement of the Swiss government and courts to transfer Marcos-related assets in Switzerland, including the Arelma bearer share certificates, to PNB to hold in escrow pending a determination by a Philippine court whether those assets are ill-gotten, and therefore forfeited. For a court in the United States, in effect, to nullify those proceedings by transferring the Arelma assets to Marcos creditors, without awaiting a determination whether the assets are, in fact, assets of the estate or of the Philippine government, frustrates the cooperative efforts of the Philippine and Swiss governments for an orderly procedure to repatriate the wealth stolen from the Philippines by its former leader. Indeed, the Swiss and Philippine governments have each expressed concern that the court of appeals' decision will undermine multilateral anti-corruption cooperation. See Pet. App. 65a-66a; No. 06-1204 Pet. Reply App. 1a-2a. Those concerns provide additional reason for this Court to review the court of appeals' decision.

II. THE COURT OF APPEALS CORRECTLY REJECTED THE ARGUMENTS OF THE ROXAS CLAIMANTS

The Roxas claimants contend that the probate exception divested the district court of jurisdiction to distribute the Arelma assets once it found that they were the property of the Marcos estate. But the probate exception has no application here. As this Court recently explained, the probate exception "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court" and "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Marshall* v. *Marshall*, 547 U.S. 293, 311-312 (2006). Here, the district court was not attempting to probate a will or administer an estate, and the assets from the Arelma securities account at Merrill Lynch are not in the possession of a state court, but are in the registry of the district court.

The Roxas claimants also contend that the district court lacked jurisdiction over the interpleader action because the Pimentel claimants were not "adverse" to the interpleaded fund. 06-1039 Pet. 19-20. However, 28 U.S.C. 1335(a)(1) requires only "[t]wo or more adverse claimants" to the fund to support jurisdiction. As the Roxas claimants acknowledge, there are at least two adverse claimants to that fund. 06-1039 Pet. 22. Moreover, the argument that the Pimentel claimants were not "adverse" to the fund because their claim is not based on a "direct tie" to the money (*id.* at 20) is incorrect; there is no need to establish a "direct tie" to have an "adverse" claim to an interpleaded fund, and the Roxas claimants do not cite any authority suggesting otherwise.

The Roxas claimants assert in passing that the Marcos estate was an indispensable party to the interpleader proceeding, and that therefore the case should be dismissed under Rule 19(b). It does not appear that that argument was fully briefed before the court of appeals. In any event, the premise of the argument is incorrect: Imelda Marcos and the Marcos estate were not absent within the meaning of Rule 19(b)—both were served with the interpleader complaint, but neither one made an appearance, and a default was entered against them. Pet. App. 44a; ER 38.

Nonetheless, if the Court grants the petition for a writ of certiorari in No. 06-1204, it should hold the petition in No. 06-1039, because, if the Court holds that the interpleader suit should be dismissed, reversal of the judgment below would affect the Roxas claimants as well.

CONCLUSION

The petition for a writ of certiorari in No. 06-1204 should be granted. The petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

Respectfully submitted.

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OCTOBER 2007

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IN THE

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

No. 1:00.cv.00595.MLR

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., *ET AL.*,

Defendants.

RELEVANT DOCKET ENTRIES*

DATE	#	DOCKET ENTRY
9/14/00	1	COMPLAINT FOR INTERPLEADER filed by plaintiff Merrill Lynch
9/14/00	4	ORDER authorizing deposit of contested funds
10/10/00	6	ANSWER filed by defendant Mariano J. Pimentel ("Pimentel")

---

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

DATE	#	DOCKET ENTRY
10/30/00	8	ANSWER and CLAIM filed by Estate of Roger Roxas and Golden Budha Corporation
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3/5/01	32	MOTION TO DISMISS, TRANSFER, OR STAY filed by Republic of the Philippines ("Republic")
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4/05/01	62	MOTION TO JOIN as defendant Philippine National Bank ("PNB") filed by Pimentel
5/29/01	100	ORDER granting motion to join PNB as defendant
6/4/01	102	AMENDED COMPLAINT FOR INTERPLEADER filed by plaintiff Merrill Lynch
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DATE	#	DOCKET ENTRY
		Complaint by Arelma, S.A. and PNB
8/1/01	120	MOTION TO RECOGNIZE SOVEREIGN IMMUNITY filed by Republic and PCGG
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6/9/03	312	REPLY in support of motion to vacate stay filed by Pimentel

DATE	#	DOCKET ENTRY
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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 04-16401, 04-16503, 04-16538

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff-Appellee,

v.

ENC CORPORATION, *ET AL.*,

Defendants.

RELEVANT DOCKET ENTRIES*

DATE	DOCKET ENTRY
7/19/04	DOCKETED CAUSE
7/19/04	EMERGENCY MOTION FOR STAY PENDING APPEAL filed by Appellants Arelma and PNB
7/27/04	STIPULATION by the parties to transfer funds to the clerk for the U.S. District Court for the District of Hawaii and to

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

DATE	DOCKET ENTRY
	expedite briefing and argument
8/2/04	ORDER denying emergency motion as unnecessary in light of stipulation
8/16/04	MOTION TO DISMISS 04-16503 filed by Pimentel
9/20/04	OPPOSITION to Pimentel's motion to dismiss 04-16503 filed by Republic and PCGG
9/30/04	REPLY in support of motion to dismiss 04-16503 filed by Pimentel
10/5/04	ORDER consolidating appeals 04-16401, 04-16503, and 04-16538, and denying without prejudice Pimentel's motion to dismiss appeal 04-16503 without prejudice
10/29/04	BRIEF submitted by Estate of Roger Roxas and Golden Budha Corp. in 04-16538 (filed 11/29/04)
10/29/04	BRIEF filed by Arelma and PNB in 04-16401
11/1/04	BRIEF filed by Republic and PCGG in 04-16503
11/30/04	BRIEF submitted by Pimentel (filed 12/21/04)
12/21/04	REPLY BRIEF filed by Estate of Roger Roxas and Golden Budha Corp.
12/23/04	REPLY BRIEF filed by Republic and PCGG
12/27/04	REPLY BRIEF filed by Arelma and PNB

DATE	DOCKET ENTRY
2/22/05	LETTER received from Merrill Lynch informing the court that it will not be filing a brief
3/15/05	ARGUED AND SUBMITTED to John T. Noonan, Sidney R. Thomas, and James L. Robart
5/4/06	OPINION affirming the district court
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5/17/06	PETITION FOR REHEARING AND REHEARING EN BANC filed by Republic and PCGG
5/19/06	PETITION FOR REHEARING AND REHEARING EN BANC filed by Golden Budha Corp.
6/15/06	EMERGENCY MOTION to stay execution of district court's judgment filed by PNB, Republic, and PCGG
6/16/06	ORDER directing Pimentel to respond to petitions for rehearing and rehearing en banc
6/22/06	ORDER granting stay of execution of judgment
7/10/06	OPPOSITION to petition submitted by Pimentel (filed 7/18/06)
7/12/06	REPLY in favor of petition submitted by PNB, Republic, and PCGG (filed 8/2/06)
9/12/06	ORDER withdrawing opinion filed on

DATE	DOCKET ENTRY
	5/4/06 and amended on 5/9/06, filing amended opinion, denying petitions for rehearing and rehearing en banc.
9/19/06	MOTION to stay further action pending petition for certiorari filed by Republic and PCGG
9/19/06	PETITION FOR REHEARING AND REHEARING EN BANC filed by Republic and PCGG
9/25/06	OPPOSITION to petition filed by Pimentel
10/3/06	ORDER staying mandate pending filing of petition for certiorari
11/3/06	ORDER denying petitions for rehearing en banc
3/23/07	MANDATE issued
4/9/07	ORDER recalling mandate, which was issued prematurely
12/10/07	NOTICE received from Supreme Court that petition for writ of certiorari was granted on 12/3/07

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. CV00-595MLR

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA, INC., *ET AL.*,

Defendants.

DEFENDANTS THE REPUBLIC OF THE PHILIPPINES' AND THE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT'S MOTION TO DISMISS, TRANSFER OR STAY AND FOR RECUSAL OF THE HONORABLE MANUEL L. REAL

Come now Defendants the Republic of the Philippines (the "Republic") and the Presidential Commission on Good Government ("PCGG"), by and through their attorneys, and hereby move this Court for an order dismissing, transferring, or staying this action. Additionally, the Republic and PCGG respectfully request that the Honorable Manual L. Real recuse himself from all further proceedings in this action.

This motion is made pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and Sections 455 and 1406 of Title 28, United States Code (28 U.S.C. §§455 and 1406).

This is an action in interpleader concerning funds held in the name of Arelma S.A., a Panamanian corporation created in Switzerland by former Philippine President Ferdinand Marcos. The funds belong to the Philippines; they were stolen by Marcos.

Any order purporting to adjudicate rights to Arelma would directly interfere both with Swiss orders directing that the matter be determined in the Philippines, and with the proceedings in the Philippines undertaken in accordance with the Swiss orders. This action therefore should be dismissed on act of state grounds, and by reason of international comity. At a minimum, the action should be stayed pending the outcome of the proceedings in the Philippines.

This action also should be dismissed, or transferred, for improper venue. The Arelma assets were not located in this District when the action was filed, none of the events giving rise to this action occurred here, and no proper party is a resident of Hawaii. If not dismissed, this action should be transferred to a venue where it might have been brought, either the Southern District of New York or the District of Columbia.

This Court also should recuse itself. Its conduct in connection with this action has been such that a reasonable person with knowledge of the facts would conclude that its impartiality might reasonably be questioned.

This motion is based upon the Notice, the supporting affidavits and exhibits submitted herewith, the Memorandum of Law in Support of this Motion, and all other papers, pleadings and documents on file in this action.

Dated at Honolulu, Hawaii, March 5, 2001.

s/Matthew J. Viola
MATTHEW J. VIOLA

Attorney for Defendants the Republic of the Philippines and the Presidential Commission on Good Government

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. CV00-00595 MLR

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., [*ET AL.*,]

Defendants.

AMENDED COMPLAINT FOR INTERPLEADER

Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), by its attorneys, Cades Schutte Fleming & Wright, brings this action for interpleader pursuant to 28 U.S.C. § 1335(a) or, in the alternative, Rule 22 of the Federal Rules of Civil Procedure, seeking declaratory, injunctive and other relief against the defendants named herein, and complains and alleges as follows:

THE PARTIES

The Plaintiff-Stakeholder

1. Merrill Lynch is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York.. Merrill Lynch is the stakeholder in this

interpleader action with respect to assets held in a securities account (the "Account") at Merrill Lynch in the name of Arelma Inc., account number 165-07312. Merrill Lynch asserts no claim to such assets.

The Defendants-Claimants

2. Upon information and belief, Arelma Inc. a/k/a Arelma S.A. ("Arelma") is a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Irnrneculada, Panama I. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland.

3. Upon information and belief, Suntrust Investment Co. S.A. ("Suntrust") is a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland.

4. Upon information and belief, John K. Burns is a citizen of the United States, with an address at 300 Wacker Drive, Suite 900, Chicago, Illinois 60606.

5. Upon information and belief, Imelda R. Marcos and Ferdinand R. Marcos, Jr. are citizens of the Republic of the Philippines, are former residents of the State of Hawaii, are currently residing in the Republic of the Philippines, are legal representatives of the Estate of Ferdinand E. Marcos (the "Estate"), and are beneficiaries of the Estate.

6. Upon information and belief, Maria Imelda Marcos and Irene Marcos Araneta are citizens of the Republic of the Philippines and are beneficiaries of the Estate.

7. Upon information and belief, the Presidential Commission on Good Government ("PCGG") is a government agency of the Republic of the Philippines, with a mailing address at 2433 Pali Highway, Honolulu, Hawaii 96817.

8. Upon information and belief, the Republic of the Philippines maintains consular offices at 2433 Pali Highway, Honolulu, Hawaii 96817.

9. Upon information and belief, Frontier Risk Capital Management L.L.C. is a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, Nevada 89511, and an address at 300 Wacker Drive, Suite 900, Chicago, Illinois 60606.

10. Upon information and belief, ENC Corporation is a corporation organized and existing under the laws of the State of Maryland, with an address at 232 Paula Lynn Drive, Silver Spring, Maryland 20904.

11. Upon information and belief, Grosvenor Capital Ltd. is a company organized and existing under the laws of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom.

12. Upon information and belief, the personal representative of the Estate of Roger Roxas is Felix Dacanay with an address at 9932 Moorings Dr., Jacksonville, Florida 32257.

13. Upon information and belief, the Golden Budha Corporation is a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue

Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, Georgia 30113.

14. Upon information and belief, Mariano J. Pimentel is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff class that obtained a Judgment against the Estate on February 3, 1995 in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840 (the "Judgment").

15. Upon information and belief, the Philippine National Bank is an agency or instrumentality of the Republic of the Philippines and a Hawaii-licensed foreign bank agency maintaining an office at 1145 Bishop Street, Honolulu, Hawaii 96813.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1335(a) because the amount in controversy exceeds $500, at least two of the defendants are adverse claimants of diverse citizenship, and Merrill Lynch stands ready to deliver the assets in the Account into the Registry of the Court. Alternatively, this Court has subject matter jurisdiction over this action under Rule 22 of the Federal Rules of Civil Procedure pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds $75,000, and the stakeholder, Merrill Lynch, is a citizen of a different state from every defendant.

17. This Court has personal jurisdiction over the defendants residing within or who may he found within the United States pursuant to 28 U.S.C. § 2361, and over all defendants pursuant to 28 U.S.C. § 1655 because this action concerns the enforcement of claims to property that will be within the District

of Hawaii upon deposit of the assets in the Account with the Registry of the Court. This Court has in rem jurisdiction over the res at issue in this action pursuant to 28 U.S.C. § 1655.

18. Venue in this Court is proper under 28 U.S.C. § 1397 because one or more defendants reside in the District of Hawaii, under 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in the District of Hawaii, under 28 U.S.C. § 1391(b)(2), 28 U.S.C. § 1391(f)(1) and 28 U.S.C. §1655 because the property that is the subject of this action will be situated within the District of Hawaii upon deposit of the assets in the Account with the Registry of the Court, under 28 U.S.C. § 1391(d) because certain adverse claimants are alien persons or entities, and under 28 U.S.C. § 1391(f)(3) because certain adverse claimants are a foreign state or an agency of a foreign state doing business in the District of Hawaii.

FACTUAL ALLEGATIONS

19. The Account is maintained at Merrill Lynch in the name of Arelma Inc.

20. This action involves a dispute as to the rightful owner or owners of the assets in the Account. Information received by Merrill Lynch and its affiliates, as set out more fully below, has given rise to conflicting claims as to the true ownership of the assets held in the Account. Accordingly, Merrill Lynch, as mere stakeholder of the Account, has brought this action seeking to interplead all persons or entities that may have a claim to the assets in the Account and to settle any and all conflicting claims with respect to the assets in the Account.

21. The current value of the Account is approximately $35,486,569.16.

THE CONFLICTING CLAIMS

22. The board of directors of Arelma, as reflected in the records of the Public Registry Office in Panama, was comprised [of] Michel Amaudruz, Dominique Amaudruz and Charles Griess (deceased) (the "Amaudruz Board").

23. Upon information and belief, defendant Suntrust was until recently the holder of share certificates of Arelma, and in that capacity appears to have had and may continue to have authority and control over Arelma and its assets.

24. Merrill Lynch or its affiliates have received telephone calls and correspondence from defendant John K. Burns and from individuals claiming to act on his behalf, in his alleged capacity as President and Chief Executive Officer of Arelma, requesting a transfer of the assets in the Account to another broker-dealer (the "Requested Transfer"). Such individuals and John K. Burns further advised Merrill Lynch or its affiliates of a purported newly-constituted board of directors of Arelma, comprised of Henry S. Itkin, Mark D. Siljander, and Teresa P. Shearer, as reflected in the records of the Public Registry Office in Panama.

25. Upon information and belief, John K. Burns further asserted that he held powers of attorney granted to him by defendants Imelda R. Marcos and by Ferdinand R. Marcos, Jr., in their individual capacities and as co-executors of the Estate, in relation to Arelma.

26. With respect to the Requested Transfer, purported company representatives of Arelma ad-

vised Merrill Lynch or its affiliates that the Amaudruz Board was not aware of the Requested Transfer, was not in possession of any instructions from authorized parties in respect of the Requested Transfer, and would not endorse same.

27. Upon information and belief, Suntrust denied a purported request by the attorney allegedly acting on behalf of John K. Burns to deliver to said attorney the share certificates of Arelma.

28. John K. Burns's attorney also forwarded to Merrill Lynch's attorneys a copy of a notice of attorney's lien on the proceeds of the Account, asserted in favor of Frontier Risk Capital Management L.L.C., ENC Corporation and Grosvenor Capital Ltd.

29. Upon information and belief, share certificates of Arelma were transferred on January 6, 2000 to the Republic of the Philippines pursuant to a Swiss court order.

30. By letter dated April 28, 2000, John K. Burns's attorney advised Merrill Lynch's attorney that Burns was acting for the Estate and that Burns, in that capacity, was the only person to whom the assets in the Account should be delivered.

31. By letter dated May 8, 2000, alleged representatives of the PCGG forwarded to Merrill Lynch or its affiliates a copy of a purported notarial deed recording an alleged shareholder's meeting of Arelma presided over by representatives of the PCGG, appointing a new board of directors. The said letter further advised that the new board of directors would issue instructions to Merrill Lynch concerning the Account.

32. By letter dated July 12, 2000, the PCGG requested that Merrill Lynch Asset Management

L.P. ("MLAM") effect the transfer of the assets in the Account to an escrow account with the Philippine depository bank.

33. On September 13, 2000, Merrill Lynch or its affiliates received a telephone call from an attorney purporting to represent the PCGG, and reiterating his client's claims to the assets in the Account.

34. By letter dated September 12, 2000, an attorney purporting to represent the Estate of Roger Roxas and the Golden Budha Corporation asserted claims to the assets in the Account, averring that said assets should be used to satisfy judgments obtained by his clients against the Estate and Imelda Marcos.

35. On September 6, 2000, Mariano J. Pimentel, allegedly on behalf of himself and all others similarly situated, filed a complaint in the United States District Court for the District of Hawaii, seeking a declaratory judgment against Merrill Lynch's affiliate MLAM, Arelma, and Imelda R. Marcos and Ferdinand R. Marcos, Jr., as legal representatives of the Estate, claiming that the assets of Arelma are beneficially owned by the Estate and that they are subject to the Judgment, referred to in paragraph 16 of this Complaint, and requesting, inter alia, that MLAM deposit all of the assets of Arelma allegedly in its custody with the Clerk of the Court for the United States District Court for the District of Hawaii.

36. A purported representative of the Philippine National Bank has asserted claims on behalf of the Philippine National Bank to the assets in the Account, averring as the basis of said claim that it was authorized to hold in escrow, at the Philippine National Bank, the assets in the Account.

37. For the foregoing reasons, Merrill Lynch is subject to conflicting claims to the assets held in the Account and has good reason to believe that it may be subject to additional conflicting claims from one or more unknown claimants, and that it is or may be exposed to multiple liability.

CLAIM FOR RELIEF

38. Merrill Lynch repeats and realleges each and every allegation set forth in paragraphs 1 through 37 as if set forth fully herein.

39. As a consequence of the foregoing, Merrill Lynch is subject to the conflicting claims of defendants, and may be subject to additional conflicting claims by unknown claimants, regarding the assets in the Account.

WHEREFORE, Merrill Lynch prays for the following relief:

A. that Merrill Lynch be permitted to deposit into the Registry of this Court the assets in the Account, that the Court enter an order granting a preliminary injunction under 28 U.S.C. § 2361 restraining defendants and any unknown claimants from prosecuting or maintaining any action against Merrill Lynch or its affiliates with respect to the Account, and that the Court enter an Order requiring defendants to interplead and establish their respective claims to such assets;

B. that Merrill Lynch and its affiliates be relieved and discharged from any further liability on any claim, now or hereafter made, with respect to the Account or the assets therein;

C. that each of the defendants, and any other prospective claimants to the assets in the Account, be enjoined from instituting any action against Merrill

Lynch or its affiliates with respect to the Account or the assets therein;

D. that Merrill Lynch be awarded its reasonable costs and attorneys' fees against defendants, jointly and severally; and

E. for such other and further relief as the Court may deem just and proper.

Dated: New York, New York, May 31, 2001

SIDLEY AUSTIN BROWN & WOOD LLP

By: s/ A. Robert Pietrzak
A. Robert Pietrzak

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. CV 00-00595 MLR

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., *ET AL.*,

Defendants.

ORDER FOR DISCHARGE OF PLAINTIFF MERRILL LYNCH, PIERCE, FENNER, & SMITH, INC.

Having considered the motion by Plaintiff and Stakeholder, Merrill Lynch, Pierce, Fenner & Smith filed pursuant to Federal Rule of Civil Procedure 22 and Title 28 United States Code section 2361, seeking discharge from any other or further liability to any and all claimants to assets that had been held in Merrill Lynch account number 165-07312 in the name of Arelma Incorporated which now are on deposit with and in the custody of this Court and the Court having heard oral argument on said motion, it is ORDERED that:

1. This case is a proper case for interpleader proceeding.

2. The Court has jurisdiction over the subject matter pursuant to 28 U.S.C. § 1335 and 28 U.S.C. § 1332, and over defendants.

3. This Court has in rem and quasi in rem jurisdiction over the assets.

4. Venue is proper in this Court.

5. Merrill Lynch is a disinterested stakeholder and has deposited all of the property in dispute in this action into the custody of the Court's Registry.

6. Merrill Lynch was faced with adverse claims and properly brought this action.

7. Merrill Lynch is hereby discharged from any present or further liability for interpleading all claimants and depositing the Assets into the Court's Registry.

8. Merrill Lynch, as a stakeholder with no interest in the Assets, is entitled to an award of attorney's fees and other costs and disbursements from the Assets.

9. All claimants are permanently enjoined and restrained from instituting or prosecuting this action or any further suit or proceeding against Merrill Lynch, its parents, subsidiaries, or affiliates, in any State or United States court affecting the assets, including but not limited to the account, or arising out of any action taken by Merrill Lynch in instituting and prosecuting this action.

10. Claimants shall interplead their respective claims to the assets, including but not limited to the account.

11. Merrill Lynch shall itemize the amount of its attorney's fees and other costs and disbursements by affirmation or affidavit.

12. This Court shall retain jurisdiction of this matter beyond al ruling concerning who is entitled to the assets for purposes of enforcing the injuction described herein.

DATED: 7/2/03

s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-16742, 03-16743

D.C. No. CV-00-00595-MLR
District of Hawaii, Honolulu

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

REPUBLIC OF THE PHILIPPINES; *ET AL.*,

Appellants,

ARELMA, INC.; *ET AL.*,

Defendants-Appellants,

v.

MARIANO PIMENTAL [*sic*]; *ET AL.*,

Defendants-Appellees.

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Hawaii

Manuel L. Real, District Judge, Presiding

Decided February 20, 2004**

Before: SCHROEDER, Chief Judge, D.W. NELSON and McKEOWN, Circuit Judges.

The Republic of the Philippines ("the Republic"), the Presidential Commission on Good Government ("PCGG"), Arelma, Inc., and the Philippine National Bank appeal the district court's order lifting the stay we imposed *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002). We have jurisdiction over these permissive appeals pursuant to 28 U.S.C. § 1292(b). We affirm.

We review for abuse of discretion whether the district court followed the terms of the remand. *See Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1404-05 (9th Cir. 1993). "There is an abuse of discretion when a judge's decision is based on an erroneous conclusion of law or when the record contains no evidence on which he rationally could have based that decision." *Id.* at 1405 (quoting *Petition of Hill*, 775 F.2d 1037, 1040 (9th Cir. 1985)). An order issued after remand may deviate from the mandate "if it is not counter to the spirit of the circuit court's decision." *Id.* at 1404.

In *In re Republic of the Philippines, supra*, a prior permissive appeal in this same case, we vacated the district court's order dismissing the Republic and PCGG from this interpleader action originally

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**This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

brought by Merrill Lynch to resolve conflicting claims to assets of Arelma, Inc., a Panamanian company that former Philippine President Ferdinand E. Marcos created. On appeal, this court concluded that the district court erred in dismissing the Republic and PCGG because they lacked any legal claim to the assets without first addressing their entitlement to sovereign immunity. We therefore remanded "for entry of an order granting the Republic and the PCGG's motion to dismiss on the grounds of sovereign immunity and entry of a stay of further proceedings." In deciding to impose a stay, we observed that "later developments," including resolution of pending forfeiture proceedings in the Philippines or a change in the immunity status of the Republic and PCGG "may render it more equitably feasible for proceedings to go forward in this case."

On remand, the district court ordered the stay lifted without explicitly considering the recently concluded forfeiture proceedings in the Philippine courts or the immunity status of the Republic and PCGG. We need not determine whether this order violated the terms of our mandate because the district court subsequently held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG.

We conclude that district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion.

AFFIRMED.

APPENDIX G

EXHIBIT 2

SOCIÉTÉ DE BANQUE SUISSE

Schweizerischer Bankverein
Societa di Banca Svizzera
Swiss Bank Corporation

Téléphone (022) 26 62 11
Das 1.10.1972: (022) 20 11 11
Télégrammes Suisbanque
Telex 22235 bage ch

Mr. José Y. CAMPOS
c/o Mr. Freddy Santschi
1604 Hang Chong Building
5 Queen's Road Central

HONG KONG

1211 Genève 11,
September 21, 1972

2, Rue de la Confédération

My dear Joe,

I take pleasure in referring to our telephone conversation when you called me from Guam yesterday.

For good orders' sake, I confirm that I immediately gave instructions to our Panama Office to constitute a Panamian [*sic*] company, the name of which will either be: LAREMA INC. or ARELMA INC. or RELMA INC. I hope I shall be able to give you the definitive name when you call me from Hong Kong next week. This company will have exactly the same

set up as Maler. We shall appoint the directors in Panama according to the laws prevailing in that country. They are selected people, from our organization and our law office. All official documents, status, etc. will be written in the usual and official manner. Dr. Barbey and myself will be appointed attorneys and the new company will be fully owned by Maler, so that all dispositions made out for Maler will apply to the new entity. As soon as the company is constituted – which will require 2-3 weeks – we are to open a direct account in the name of the new company with Merrill Lynch, New York, giving them authority to operate the account, but excluding withdrawals of cash, securities or pledging of the portfolio. This account will work as a trading account and this is the reason why it should be opened with Merrill Lynch direct.

When thinking over this problem, I thought of another solution which I would like to propose: we create this corporation, we keep the account in Geneva and we give a trading authority in favour of Merrill Lynch New York. These people will then be able to trade in this account almost as easily as if the account was opened with them. However, this solution is a little bit more costly because all transactions have to be charged with a Swiss brokerage in addition to the American brokerage. The advantage of this solution is, however, that we are keeping a very good control of what these people are doing.

Anyway, to cut links with the present account already opened with Merrill Lynch under an individual's name I suggest that the amounts in dollars be sent to us under ref. AZUR and I will then utilize them either according to solution 1 or 2.

My dear Joe, it is my duty to tell you what our long experience has been with accounts managed by brokers. The performance has always been dull but in some cases disastrous. These people are making the portfolios turn as a top: the more transactions the more commissions. Practice has shown that after a while the client's interest is vanishing in their mind. Believe me, tell our friend that personally, I have never seen one of these arrangements working properly to the satisfaction of the client. When the client realizes what happens, it is already too late and the damage is done. Excuse me for expressing so frankly my opinion, but I know the brokers very well and I should have to be blamed for not telling my friends what experience has taught me.

In conclusion, we would be ready to constitute a well diversified growth portfolio which I am sure will prove rewarding over the years. Every transactions will be taken care of at our end in the best interest of our friends. I admit my proposal is far from the contemplated arrangement and should it not be suitable, may I suggest solution No 2 keeping in mind that solution No 1, which is what you proposed over the phone, would be quite in order too.

I look forward to hearing from you and please give my very best regards to our friends and to your family.

Sincerely,

s/ [Illegible]

J. L. SUNIER

EXHIBIT 3

ARELMA INC.
C/O SOCIETE DE BANQUE SUISSE
CONFEDERATION 2
1211 GENEVA 11, SWITZERLAND
ATTN: MR. SCHLEGEL

TO: MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

BE IT RESOLVED: That this corporation, ARELMA INC., Panama c/o Swiss Bank Corporation, Geneva, Switzerland be, and it hereby is, authorized and empowered to open and maintain an account with MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and its successors, by merger, consolidation or otherwise, and assigns, hereinafter called the brokers, for the purchase and sale of stocks, bonds or securities, on exchanges of which the brokers are members or otherwise, and that any of the officers hereinafter named be, and he hereby is, authorized to give written or verbal instructions by telephone, or telegraph, or otherwise, to the brokers to buy or sell stocks, bonds, or securities, either for immediate or future delivery and, if he deems proper to secure payment therefor with property of this corporation; and he shall at all times have authority in every way to bind and obligate this corporation for the carrying out of any contract, arrangement or transaction which shall, for or on behalf of this corporation, be entered into or made with or through the brokers; and that the brokers are authorized to receive from this corporation, checks and drafts drawn upon the funds of this corporation by any officer or employee of this corporation, and to apply the same to the credit of this corporation or to

its account with said brokers and the said brokers are authorized to receive from said officer(s) or from any other officer or employee of this corporation, stocks, bonds, or other security for the account of this corporation with said brokers; said brokers are further authorized to accept instructions from any officer herein named as to the delivery of stocks, bonds, or other securities from the account of this corporation and at his direction to cause certificates of stocks, bonds, and other securities held in said account to be transferred to the name of any officer hereinafter named or of this corporation in the discretion of said officer; and delivery to any such officer of such stocks, bonds, or securities, issued as directed by him, shall be deemed delivery to this corporation; and any such officer shall have the fullest authority at all times with reference to any transaction deemed by him to be proper to make or enter into for or on behalf of this corporation with the brokers or others. All confirmations, notices and demands upon this corporation may be delivered by the brokers verbally or in writing, or by telegraph, or by telephone to any such officer and he is authorized to empower any person, or persons, that he deems proper, at any time, or times, to do any and all things that he is hereinbefore authorized to do. That this resolution shall be and remain in full force and effect until written notice of the revocation hereof shall be delivered to the brokers. The officer(s) herein referred to are named as follows, to-wit:

(1) Mr. André Barbey Attorney

(2) Mr. Jean-Louis Sunier Attorney

We, André Barbey and Jean-Louis Sunier, Attorneys of Arelma Inc., Panama hereby certify that the foregoing is a full, true and correct copy of a resolu-

tion duly and regularly passed and adopted by the unanimous vote of the Board of Directors of said company at a meeting thereof duly called and held at the office of said company on the 25th day of September, 1972, at which meeting all directors were present and voting; that said resolution appears in the minutes of said meeting, and that the same has not been rescinded or modified and is now in full force and effect.

I further certify that said corporation is duly organized and existing, and has the power to take the action called for by the foregoing resolution.

s/ [Illegible]

ARELMA INC

SEAL
of the Attorneys, duly appointed, according to Escritura Publica No. 6315, by ...

Attorneys
Signatures and Powers certified
SWISS BANK CORPORATION
Geneva, 27th November 1973

EXHIBIT 9

Dept.: CASH BW Trans. Code: 11

AT THE REQUEST OF {GENEVE } {0-541-040002-00}

C 063533 No. 1063533

We send you attached our check in accordance with instructions dated C.11.17.72

Remarks: XXXXXXXXXXXXXXXXXXXXXXXXXX
B/O ONE OF SWISS BANK CORP.
GENEVA CLIENTS

SWISS BANK CORPORATION, NEW YORK BRANCH,
15 NASSAU STREET, NEW YORK, N.Y., 10005

MEMORANDUM

MAIL TO:

ARELMA INC.
C/O MERRILL LYNCH
ONE LIBERTY PLAZA
165 BROADWAY 49TH FL.
NEW YORK, N.Y.
ATTN: MR. SACCARDI

$ *2.000.000.00

DATE: NOV. 20, 197[2]
VERY TRULY YOURS,
SWISS BANK CORPORATION

DRAWN ON: THE CHASE MANHATTAN BANK
1 CHASE MANHATTAN PLAZA
NEW YORK, N.Y.

s/ [Illegible]

EXHIBIT 23

Merrill Lynch,
Pierce Fenner & Smith Inc.
Pan Am Building
200 Park Avenue
37th Floor
New York, New York 10166-0236
212 916 7600
Telex WUI 6801303 MERLEAP

[LOGO] Merrill Lynch

October 21, 1987
ARELMA Inc.
c/o Suntrust Investment Co. SA
P.O. Box 195
1211 Geneva 25, Switzerland

Dear Sirs:

Please be informed that per your telex, we are issuing a check for $5,000.00 regarding Administrational fees for the ARELMA account.

I must also inform you that Merrill Lynch has been served notice that all assets and funds are to remain within the account and cannot be dispersed with the exception of taxes, fees and conditions maintaining the management of the assets.

The Republic of the Philippines V. Ferdinand E. Marcos, Et Al. United States District Court, etc. has ordered Merrill Lynch restrict the access of this account.

However, the orderly management of account as in the past is allowed.

I am sure you will wish to discuss this with us.

Sincerely,

s/ Paul Wachendorfer

Paul Wachendorfer, Jr.
Vice President
Merrill Lynch International
Private Client Services

EXHIBIT 27

LIMITED POWER OF ATTORNEY

THE UNDERSIGNED, Madame Imelda Romualdez Marcos citizen of the Phillippines [*sic*], (the "Grantor") does hereby grant Specific Power of Attorney to the below identified person:

NAME: Mr. John K. Burns (PASSPORT NO.: 091519208 USA)
ADDRESS Frontier Risk Capital Management LLC
300 South Wacker Drive, Suite 900
Chicago, Illinois 60606

This Limited Power of Attorney gives Mr. John K. Burns: the following exclusive "Rights" in relation to: Arelma S.A. and/or Arelma Inc., the "Company". These Rights include the rights to investigate, make the demand for an audited accounting of the Company's affairs, to hire or dismiss any advisors to the Company, to vote any and all voting shares issued by the Company held in trust and/or in the name of any other party or held in any manner, to negotiate and arrange collection and/or transfer of the full amount of any shares or held in any manner, to negotiate and arrange collection and/or transfer of the full amount of any shares issued by the Company, any assets of the Company in the interest of the Grantor as his best judgment dictates. These Rights pertain, in addition, to any funds securities and/or shares in the Company kept in any and all identified and/or unidentified type of deposit and or securities account held and or controlled by the entities Poncet Turretini Amadruz & Neyrod, Avocats, and/or Suntrust Investment Company S.A. and/or these entities

partners, officers, owners associates and/or the relatives of any of these persons that is or may be proven to belong of the Company itself and/or the Undersigned and to be under the legal control of the Undersigned individually and/or that may be jointly controlled with other parties who have each issued to Mr. Bums the same Power.

Mr. Burns is authorized to retain the law firm of Winston & Strawn of Chicago with offices in Geneva to advise him and he is further empowered to retain other professional advisors in his sole discretion and for his own account unless otherwise agreed. This Full Power of Attorney is extended and is effective as of January 8, 1997 through the 1st of February, 1998. This Power of Attorney may be terminated by mutual agreement of both parties, in writing and delivered by certified mail, receipt requested.

This Power of Attorney further authorizes Mr. Burns to represent the Grantor out of court and before all courts, administrative bodies and boards of arbitration, to enter into agreements regarding jurisdiction and settlements, to receive and deliver securities, payments or any other matter in dispute, to insurance and enforce executions of debts, to represent the Grantors in credit matters and in matters requiring public authentication and also in matters of the recording of real estate transactions.

The holder of this power of Attorney is further authorized to direct that said any party transfer to him and to the Grantor's designee (to be named in the future) an amount equal to or up to 100% of the gross proceeds of any accounts and or voting rights over any shares obtained for the benefit or use of the Grantor.

s/Imelda Romualdez Marcos
IMELDA ROMUALDEZ MARCOS
Individually and Executrix or if applicable
Co-Executrix of the Estate of Ferdinand E. Marcos

Republic of the Philippines, City of Manila

BEFORE ME, a Notary Public for and in this City, this 25th day of July, 1997 personally appeared Imelda Romualdez Marcos with Philippine Passport No. K463008 issued on February 26, 1992 at Manila, known to be the same person who executed this Full Power of Attorney, duly signed by her and her instrumental witnesses and she has acknowledged to me the same is her free and voluntary act and deed.

s/ C.R. Ramos

[ILLEGIBLE STAMP]

EXHIBIT 28

LIMITED POWER OF ATTORNEY

THE UNDERSIGNED, Mr. Ferdinand Romualdez Marcos Jr. citizen of the Phillippines [*sic*], (the "Grantor") does hereby grant Specific Power of Attorney to the below identified person:

NAME: Mr. John K. Burns (PASSPORT NO.: 091519208 USA)
ADDRESS Frontier Risk Capital Management LLC
300 South Wacker Drive, Suite 900
Chicago, Illinois 60606

This Limited Power of Attorney gives Mr. John K. Burns: the following exclusive "Rights" in relation to: Arelma S.A. and/or Arelma Inc., the "Company". These Rights include the rights to investigate, make the demand for an audited accounting of the Company's affairs, to hire or dismiss any advisors to the Company, to vote any and all voting shares issued by the Company held in trust and/or in the name of any other party or held in any manner, to negotiate and arrange collection and/or transfer of the full amount of any shares or held in any manner, to negotiate and arrange collection and/or transfer of the full amount of any shares issued by the Company, any assets of the Company in the interest of the Grantor as his best judgment dictates. These Rights pertain, in addition, to any funds securities and/or shares in the Company kept in any and all identified and/or unidentified type of deposit and or securities account held and or controlled by the entities Poncet Turretini Amadruz & Neyrod, Avocats, and/or Suntrust Investment Company S.A. and/or these entities

partners, officers, owners associates and/or the relatives of any of these persons that is or may he proven to belong of the Company itself and/or the undersigned and to be under the legal control of the Undersigned individually and/or that may be jointly controlled with other parties who have each issued to Mr. Bums the same Power.

Mr. Burns is authorized to retain the law firm of Winston & Strawn of Chicago with offices in Geneva to advise him and he is further empowered to retain other professional advisors in his sole discretion and for his own account unless otherwise agreed. This Full Power of Attorney is extended and is effective as of January 8, 1997 through the 1st of February, 1998. This Power of Attorney may be terminated by mutual agreement of both parties, in writing and delivered by certified mail, receipt requested.

This Power of Attorney further authorizes Mr. Burns to represent the Grantor out of court and before all courts, administrative bodies and boards of arbitration, to enter into agreements regarding jurisdiction and settlements, to receive and deliver securities, payments or any other matter in dispute, to insurance and enforce executions of debts, to represent the Grantors in credit matters and in matters requiring public authentication and also in matters of the recording of real estate transactions.

The holder of this power of Attorney is further authorized to direct that said any party transfer to him and to the Grantor's designee (to be named in the future) an amount equal to or up to 100% of the gross proceeds of any accounts and or voting rights over any shares obtained for the benefit or use of the Grantor.

MR. FERDINAND ROMUALDEZ MARCOS JR.
Individually and Executrix or if applicable
Co-Executrix of the Estate of Ferdinand E. Marcos

s/ [Illegible]

Republic of the Philippines, City of Manila

BEFORE ME, a Notary Public for and in this City, this 19th day of August, 1997 personally appeared Ferdinand Romualdez Marcos Jr. with Philippine Passport No. [illegible] issued on 04.22.92 at Manila, known to be the same person who executed this Full Power of Attorney, duly signed by her and her instrumental witnesses and she has acknowledged to me the same is her free and voluntary act and deed.

s/ [Illegible]
ROBERT A.C. SISON
Notary Public
PTR # 0840891 – Makati
04.24.97

EXHIBIT 29

MEMORANDUM
RE: ARELMA, PANAMA
prepared in answer to the letter dated October 27th, 1997 addressed by the District Attorney, Mr. P. Cosandey to Dr. A. Wicki

Please find, attached herewith:

- a listing of the documents relating to Arelma case, in five sections

- a file containing the photostat copies of the documents detailed in the above mentioned listing. The file is divided in five parts, according to the five sections

Hereafter, for your easy guidance, a summary of the history of this relationship.

At the time when I was working for Swiss Bank Corporation, and as a senior officer of the bank, I was called to follow up a new relationship, established in september 1972 with the late Mr. Ferdinand Marcos.

We were requested, in fact, by Mr. Joe Campos, who was a very close friend to Mr. Ferdinand Marcos, to set up a Panama Company in whose name an account will be opened with Merrill Lynch Asset Management, New-York and simultaneously, a very small account with Swiss Bank Corp Geneva for the payment of the yearly fees of the company.

We did carry on the instructions (please refer to section three of the list of contents) and a company

called ARELMA INC. was incorporated with the assistance of Swiss Bank Corp Panama.

The account was opened with Merrill Lynch Asset Management, New-York and a limited power of attorney was granted to them to manage the account within certain guidelines (please refer to section two to see the details of the account opening documentation)

The section one contains all the details relating to the incorporation of Arelma and the composition of its Board of Directors. You will notice that myself and Mr. Andre Barbey (of Swiss Bank Corporation) were granted a general statutory power of attorney by the Board of Arelma in 1972. Later on, we were elected as members of the Board, myself being President and Mr. Barbey, secretary.

In 1981, upon a board meeting chaired by myself, the decision was taken to issue 2 certificates, each of 50 shares, which were signed by me according to a resolution taken by the Board.

Both Mr. Barbey and myself resigned from the board of Arelma in november 1982, at the request of Swiss Bank Corp.

A new board was elected, composed of

- Mr. Michel Amaudruz, President
- Mr. Charles Griess, treasurer
- Mrs. Dominique Amaudruz, vice-president and secretary

This board is still the same, actually, except that Mr. Charles Griess passed away and was not replaced.

In 1983, I left the bank to create SUNTRUST INVESTMENT CO.

Although I was no more on the Board of Arelma, I kept the two certificates of shares in my safe, with the agreement of Mr. Joe Campos and of the Bank (Swiss Bank Corp.) as I was the only person who was in contact with the family Marcos, through Mr. Campos

Then, happened the events of which you are aware, i.e. the blocking of the assets of the Marcos family in Switzerland and apparently, in the U.S.A. as mentioned in the letter dated 21st october 1987 addressed to Arelma c/o Suntrust Investment Co., by Merrill Lynch Asset Management (please refer to section 4 of the file)

Considering that:

1) the Board of Directors of Arelma is composed of:

Mr. Michel Amaudruz, lawyer, domiciled in Geneva, as President of Arelma

Mrs. Dominique Arnaudruz, lawyer, domiciled in Geneva, as Secretary and vice-president

N.B.: Mr. Michel Amaudruz is, at the same time, President of the board of Suntrust Investment Co.

2) the Certificates of all the issued shares of Arelma were in my hands

3) the assets of Arelma were blocked, by order of justice, in Switzerland as well as in the States (as it appears out of the letter of Merrill Lynch to Arelma, c/o Suntrust, dated 21st october 1987),

I did not have to worry about possible withdrawals as long as I had no evidence of any release of the

freezing of the accounts held with Merrill Lynch Asset Management

Few months ago, a certain Mrs. Edmunds, pretending to act on behalf and for the account of Mrs. Imelda. Marcos (considered as being "The effective economic beneficial owner" according to Mrs. Edmunds) conveyed to us a public deed showing:

- that an extraordinary shareholders meeting (!!!) of Arelma was held in the State of Maryland, in the USA, on the 12th of march 1997;

- that all the shares (!!!) were present or represented at that meeting (we do not know on which basis such an assessment was made and accepted by official authorities in Panama, while the shares did never leave our safe in Geneva);

- that a new board was elected (please refer to document 1.16 of section 1)

Another few months after that, we received a fax from Merrill Lynch, dated July 13th, 1997, which content is self explanatory (please refer to document no.2.3, under section 2 of the file). We responded to Merrill Lynch message by our fax of July 15th, 1997, informing them that the actual Board of Arelma was in total ignorance of the "tranfer request" and warning them that said actual board will not endorse any responsibility in case of execution of unauthorized instructions (please refer to documents no.2.4 and 2.5 under section 2 of the file)

After the above mentioned attempts, I was subject to an uninterrupted flow of harassments, originating mainly from Mr. John K. Burns (whose correspondence has already been transmitted to yourgoodself through our lawyer Mr. Wicki).

In addition to the last correspondence of Mr. Burns, may I kindly draw your attention to the document no.1.17, under section one of the file, which is a telefax message of Merrill Lynch, dated september 5th, 1997, addressed to Mr. Michel Amaudruz, C/O Suntrust Investment Company. You will kindly notice that reference is made to the alledged shareholders meeting of March 12th, 1997 (document no.1.16) and subsequent meeting of June 12th, 1997 (no public deed received)

I could imagine that public deeds containing resolutions taken on the basis of a false assessment (i.e. presence of all the shares) would very certainly attract serious questions marks vis-à-vis the authors of such assessments (!!!).

Based on all the above mentioned recent events and on the fact that I received no confirmation of release of the freezed accounts from US Courts and that Mr. Bruno Bonvin, of Swiss Bank Corp Geneva had confirmed the ever existing freezing of the small account with them, and taking, into consideration the numerous queries (by phone, fax and letters) of Merrill Lynch with regard to the execution of the instructions relating to transfer of funds, I wondered whether the assets, held with them were still blocked, according to the terms of their letter of 21st october 1987.

I had the clear impression that I could not any more rely on the blocking operated by Merrill Lynch,

Under the above mentioned new circumstances, I did not have any other choice than to put the shares of Arelma at the disposal of the Judicial Swiss authorities.

Geneva, November 3rd, 1997
J. L. Sunier

EXHIBIT 35

DATE STAMP: Feb. 3, 1995

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

C.A. No. 86-0390

IN RE:
ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION

CELSA HILAO, *ET AL.*,

Plaintiffs,

v.

ESTATE OF FERDINAND E. MARCOS

Defendant.

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Manuel L. Real, presiding, and the issues having been tried, and the jury having rendered its verdict on liability and damages,

The Court enters final judgment pursuant to FRCP 58 in favor of 135 randomly selected Class Claims and the Plaintiff Class in accordance the with

the unanimous verdicts of the jury on September 24, 1992, February 23, 1994 and January 18, 1995 and the Court's Judgment on Liability as follows.

1. The Court incorporates herein its Judgment on Liability entered October 20, 1992 and its Order entered December 17, 1992 denying defendant's posttrial motions re liability.

2. Judgment for compensatory damages is entered for the below named randomly selected class claims as follows:

Torture Subclass

Claim No.	Victim Name	Amount
PT-4759,	Vitug, Dante B.	$75,000
PT-2143,	Perlas, Eztanislao P.	$30,000
PT-3415,	Bognot, Servillano G.	$35,000
PT-3996	Vega, Angelo	$30,000
PT-1643,	Palma, Ariel Revilla	$50,000
HT-49,	Carina, Bartolome	$50,000
PT-4758,	Valdez, Fortunato	$30,000
PT-2915,	Baay, Edmund	$20,000
PT-555,	Gudayan, Arte	$30,000
PT-535,	Butac Roy	$30,000
PT-3794	Payacag, Candido B., Sr.	$50,000
PT-2473,	Pineda, Bernardo	$100,000
PT-1897,	Lamangan, Joel C.	$100,000
PT-4603,	Sumabat, Maximiano, Jr.	$75,000
PT-415,	Gardon, Antonio S.	$30,000

PT-3770,	Ubod, Policarpio	$30,000
PT-5007,	De Ramos, Mariano B.	$20,000
PT-5129,	Tayag, Jean C.,	$100,000
PT-3624,	Diamante, Crisostomo D.	$20,000
PT-5057,	Anober, Nemesio, Sr.	$30,000
PT-3599,	Flores, Jorge Estioca,	$75,000
PT-2727,	Cerenado, Fidel D.,	$50,000
PT-4970,	Rafales, Porferio O.	$50,000
PT-3108,	Ador, Julio	$50,000
PT-3035,	Calizo, Josue S.	$50,000
PT-2279,	Miraflor, Antonio	$50,000
PT-006,	Gipalaga, Iniego	$75,000
PT-3153,	Delmonte, Gemma B.	$20,000
PT-3715,	Cordero, Leopoldo	$50,000
PT-3267,	Paredes, Efraim.	$50,000
PT-1052,	Depalco, Joey	$30,000
PT-3716,	Carlos, Winnie	$10,000
PT-1318,	Margate, Balbino C.	$30,000
PT 1688,	Cordero, Roberto	$20,000
PT-4450,	Mercader, Jerry A.	$65,000
PT-3407,	Banares, Ely L.	$30,000
PT-3490,	Segui, Josepito C.	$50,000
PT-4022,	Bitancor, Romeo R.	$100,000
PT-2185,	Regio, Bernardo R.	$30,000
PT-4698,	Edralin-Tiglao, Raquel	$50,000

PT-1868,	Roque, Fiolino	$75,000
PT-2593,	Sambajon, Domingo	$30,000
PT-3049,	Dolosa, Ramon	$30,000
PT-2344,	Baez, Marcelino	$30,000
PT-1645,	Pution, Roberto	$75,000
PT-3362,	Nacario, Melchor F.	$30,000
PT-1175,	Fajardo, Wilfredo F.	$50,000
PT-3080,	Ramirez, Juanito C.	$25,000
PT-1205,	Masangkay, Mariana R.	$75,000
PT-2094,	Camuta, Jose,	$30,000
PT-2598,	Villanueva, Benigno	$20,000
PT-252,	De los Angeles, Alexander	$100,000
PT 344,	Demelino, Matilde A.	$20,000
PT-3687,	Salvana, Estrella	$30,000
PT-4440,	Kasim, Abdul	$65,000
PT-3894,	Dionsay, Antonio	$75,000
PT-2317,	Umpad, Romeo B.	$30,000
PT-3531,	Cowak Fredie	$30,000
PT 2584,	Pabilani, Jose	$50,000
PT 757,	Aspirin, Ceriaco	$100,000
PT-3873,	Bolastig, Junnie T.	$75,000
PT-3658,	Madendog, Pilot	$100,000
PS-3031,	Usman, Motalib	$40,000
PT-518,	Rebullido, Felixburt	$50,000
PT-4985,	Deri, Raul G.	$85,000

PT-5093,	Kiram, Linding	$30,000
PT-4516,	Sela, Eling	$30,000

Summary Execution Subclass

Claim No.	Victim Name	Amount
PS-2036,	Alcantara, Bartolome	$130,000
PS-460,	Hara, Juliana Isipin	$93,667
PS-1125,	Aggabao, Orlando	$135,000
PD-118,	Manog, Uldarico C.	$134,533
HS-17,	Figuerres, Alfonso C	$128,533
PS-2416,	Mijares, Luis Manuel	$140,000
PS-3339,	Salasol, Saliguidan	$ 95,833
PS-292,	Ganacias, Alberto	$148,000
PS-209,	Bucag, Renato	$175,000
PS-684,	Cabayao, Salvador J.	$ 79,042
PS-1629,	Gumarang, Agrifino, Jr.	$ 81,667
PT-2855,	Jimenez, Samuel	$103,667
PS-194,	Falsis, Melchor	$ 78,555
PT-5049.	Belleza, Alberto	$ 90,000
P5-695,	Davantes, Reginaldo F	$105,000
PS-1048,	Llabres, Antonio	$ 85,000
PS-1218,	Ceron, Juan Z.	$101,700
PS-2220,	Mokamad, Magsaysay H	$ 85,000
PS-1852,	Dimatingkal, Tayong	$ 90,000
PS-2996,	Kadatuan, Ibrahim	$150,000

PS-2230,	Saban, Kubaid	$ 90,000
PS-276,	Kindao, Kamilan	$110,000
PS-2503,	Mamalinta, Hadji Samad	$ 95,000
PS-2943,	Kamad, Samama	$130,000
P5-3153,	Faks, Samad	$125,000
PS-2005,	Gamha, Alamanso	$ 90,250
PS-3053,	Orangotan, Saaban	$125,000
PS-3294,	Bada, Kanakan	$150,000
PS-2164,	Dapak, Musa	$115,278
PS-1966,	Nacua, Alejandro	$110,000
PS-617,	Orcullo, Alexander L.	$160,000
PS-1128,	Baloro, Bonifacio	$100,000
PS-425,	Baloro, Lucia	$100,000
PS-2794,	Abudllah, Abas	$125,000
PS-2278,	Anti, Kandog.	$145,000
PS-2027,	Kasim, Dakungan	$150,000
PS-278,	Malicay, Manolo	$126,111
PS-2869,	Magit, Tammo	$ 75,000
PS-2509,	Mama, Kabalukan	$125,000
PS-3248,	Panalay, Aminola	$125,000
PS-3311,	Parasan, Salaban	$175,000
PS-2369,	Talib, Asim	$180,000
PS-3074,	Tunggal, Toto	$185,000
PS-1720,	Alipoplo, Paglas	$119,444
PS-1008,	Albaira, Demetrio	$ 90,000

PS-066,	Regalado, Marife	$ 93,611
PS-2366,	Taha, Macmod	$162,000
PS-692,	Casia, Saturnino	$130,000
PS-331,	Giente, Enrique Alegando	$140,000
PS-2088,	Hamoy, Socrates G.	$111,250
PS-1716,	Acaso, Crisanto, Jr.	$ 81,944

Disappearance Subclass

Claim No.	Victim Name	Amount
PT-1772,	Wyco, Lucilo	$119,250
PD-552,	Kamsa, Sulaiman	$108,005
PD-349,	De la Cruz Nazareno, Ernesto	$57,600
PD-501,	Buenaventura, Jonny	$67,083
PS-2970,	Omar, Abdullah	$103,583
PD-770,	Maranao, Kutu	$55,000
PD-556,	Madi, Maguid	$125,000
PS-3075,	Kuda, Minundas	$90,903
PD-053,	Albiso, Miguel	$110,000
PD-385,	Bodiongan, Urbano G.	$87,500
PD-426,	Andayao, Bodo	$65,000
PD-663,	Dalgan, Maglib	$87,222
PD-903,	Pena, Batokan	$115,000
PD-684,	Dumpao, Usman	$50,000
PD-995,	Guardo, Decoroso C.	$105,000
PD-723,	Esmael, Ulting	$80,000

PD-740,	Abdulgani, Singapol	$110,000

3. Judgment for compensatory damages is entered for the remaining members of the Plaintiff Class as follows:

a. for the remaining Plaintiff Subclass of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured while in the custody of the Philippine military or para-military groups in the aggregate of $251,819,811.00 to be divided pro rata.

b. for the remaining Plaintiff Subclass of all current citizens of the Republic of the Philippines their heirs and beneficiaries, who between September 1972 and February 1986 were summarily executed while in the custody of the Philippine military or Para-military groups in the aggregate of $409,191,760.00 to be divided pro rata.

c. for the remaining Plaintiff Subclass of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 disappeared (and are presumed dead) while in the custody of the Philippine military or para-military groups in the aggregate of $94,910,640.00 to be divided pro rata.

4. Judgment for exemplary damages, to make an example for the public good, is entered in the aggregate of $1,197,227,417.90 to be divided pro rata among all members of the Plaintiff Class.

[PARAGRAPH 5 STRUCK OUT]

6. Pursuant to FRCP 54(d) (2) (B), the Court orders that Class Plaintiffs (and their attorneys') claim for counsel fees and their submission in support thereof be deferred and postponed until further order of the Court.

7. Pursuant to FRCP 54(d)(1), Class Plaintiffs are awarded costs previously taxed by the Clerk together with such costs incurred since then as the Clerk may tax.

8. Plaintiffs' Motion to Amend the Pleadings is granted, and Count 2 of the Consolidated Amended Complaint is deemed amended to state a claim for relief for a permanent injunction.

9. Plaintiffs' Motion for Entry of a permanent Injunction is granted.

a. The Court finds, based upon all evidence submitted in this litigation:

(1) Plaintiffs have succeeded on the merits of this litigation and the judgment herein exceeds the assets of the defendant Estate both the amount admitted by the defendant and the amount proved by Plaintiffs.

(2) Beginning as early as 1968, Ferdinand E. Marcos and Imelda R. Marcos established secret bank accounts under alias names and the use of Liechtenstein foundations in various countries with banking secrecy laws, including Switzerland.

(3) Ferdinand and Imelda Marcos engaged in a sophisticated pattern and practice of secreting their assets, periodically laundering those assets in various countries, and redepositing the monies in Swiss bank accounts in the names of multiple Liechtenstein foundations.

(4) Federal courts have twice enjoined the transfer of Marcos assets finding a pattern and practice of secreting their assets, and the courts of appeals have thrice affirmed the injunctions. See Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994), cert. denied ___ U.S. ___ (1/23/95); Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988); Republic of the Philippines v. Marcos, 806 F.2d 344 (2nd Cir. 1986).

(5) Imelda Marcos and Ferdinand R. Marcos, the legal representatives of the Estate, have never opened a probate proceeding, and opposed the opening of involuntary probate proceedings in the United States and the Philippines.

(6) This Court previously found the deposition testimony of Imelda Marcos evasive as regards the amount and location of Estate assets.

(7) There is a probability that the Estate has assets other than the foreign bank accounts identified by the Estate's legal representatives.

(8) Imelda Marcos refused to consent disclosure of documents in the possession of Swiss banks.

(9) Imelda Marcos collaterally attacked in Switzerland this Court's letters rogatory addressed to Swiss authorities requesting documents from Swiss banks.

(10) Credit Suisse and Swiss Bank Corporation were served with subpoenas in New York as ordered by this Court, but failed to produce any documents regarding Estate accounts in Switzerland.

(11) Imelda Marcos has vigorously defended this litigation and paid millions of dollars in legal fees.

(12) After Issuance of the Preliminary Injunction in this litigation, Imelda Marcos and Ferdinand R. Marcos, on behalf of the Estate, entered into two agreements with the Republic of the Philippines in June 1992 to transfer and split all the assets of the Estate.

(13) The Republic of the Philippines has no judgment against the Estate, but has possession of millions of dollars of assets owned by or in which the Estate has an interest.

(14) Because the Plaintiffs' judgment exceeds the assets of the Estate, the heirs and beneficiaries of the Estate have no expectation of receiving any monies therefrom.

(15) Credit Suisse and Swiss Bank Corporation continue to hold several hundred million dollars in accounts owned by or in which the Estate has an interest.

(16) The Republic of the Philippines is in privity of contract and acting in concert with the Estate to transfer and split the assets of the Estate.

(17) Credit Suisse and Swiss Bank Corporation are agents and representatives of the Estate.

(18) The Republic of the Philippines is an agent, representative, aider or abettor of the Estate.

(19) The defendant Estate, its legal representatives, Credit Suisse, Swiss Bank Corporation and the Republic of the Philippines received no-

tice of the hearing for permanent injunction and had an opportunity to participate and present evidence.

(20) There is a substantial likelihood that the Marcoses' pattern and practice of transferring and secreting assets will continue and prevent the satisfaction of the judgment herein unless a permanent injunction is entered.

(21) The Plaintiffs have no adequate remedy at law.

b. The defendant Estate, and its agents, representatives, aiders and abettors are, until satisfaction of the judgment herein, permanently enjoined and restrained from directly or indirectly:

(1) transferring, conveying, encumbering, dissipating, converting, concealing, or otherwise disposing of in any manner any funds, assets, claims or other property or assets owned actually, equitably or beneficially by, or in the possession or custody of or held by or in any way on behalf of or for the benefit of the Estate of Ferdinand E. Marcos; and

(2) destroying, mutilating, concealing, transferring, altering or otherwise disposing of in any manner any books, records, computer programs, computer files, computer printouts, correspondence, memoranda, brochures, or any other documents of any kind, or pertaining in any manner to Ferdinand Marcos, the Estate of Ferdinand Marcos or its representatives, except to their attorneys or in compliance with orders of this Court.

c. Non-parties Credit Suisse, Swiss Bank Corporation and the Republic of the Philippines are identified to this permanent injunction as agents representatives, aiders or abettors of the defendant Estate and subject to its terms.

d. Plaintiffs' counsel may serve this permanent injunction upon legal counsel for the Defendant Estate, it appearing that the estate's legal representatives are currently outside the United States, as follows:

(1) On Imelda R. Marcos by service on her attorney Lex Smith by hand or facsimile; and

(2) On Ferdinand R. Marcos by service on his attorneys John Bartko by certified mail or facsimile.

10. Any monies collected by settlement or execution on judgments entered in any of the MDL 840 cases against the defendant Estate shall be held and disbursed as directed by the Court.

11. Pursuant to FRCP 23, the Court retains continuing jurisdiction over the Motion for Contempt, the Permanent Injunction, settlement, the distribution of any monies collected by settlement or execution, the determination of counsel fees, and any other matters as may properly come before the Court.

Dated: 1/27/95

s/ Manuel L. Real
MANUEL L. REAL
MDL 840 Transferee Judge

EXHIBIT 44

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. CV00-00595 MLR

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., A/K/A ARELMA S.A., *ET AL.*,

Defendants.

DEFENDANT SUNTRUST INVESTMENT COMPANY'S RESPONSE REQUESTED FOR ADMISSION FROM THE DEFENDANTS ESTATE OF ROGER ROXAS AND THE GOLDEN BUDHA CORPORATION

Defendant SUNTRUST INVESTMENT CO., S.A. ("Suntrust") by and through its undersigned counsel and pursuant to Rule 36, Federal Rules of Civil Procedure, Response Requested for Admission served upon it by Defendants Estate of Roger Roxas and The Golden Budha Corporation as follows:

* * *

Request for Admissions No. 6: That Arelma, Inc. was incorporated for the purpose of hiding assets owned by Ferdinand Marcos.

Response: To Suntrust's knowledge, the purpose of the incorporation of Arelma, Inc. was to receive funds owned by Ferdinand Marcos. Suntrust does not know whether these assets were supposed to be hidden, and if so, from whom.

Request for Admissions No. 7: That Arelma, Inc. was controlled by Ferdinand Marcos or his representatives during his lifetime.

Response: Admitted.

* * *

EXHIBIT 47

[A]

DECISION OF THE SWISS FEDERAL COURT (BUNDESGERICHT)

1A.91/1997/odi

In the First Public Law Division [of this Court],
Dec 19, 1997:

Judicial Panel comprised of: Judge Aemisegger, presiding judge of the First Public Law Division; and

Judges Feraud and Jacot-Guillarmod

Clerk of Court: [Ms.] Gerber.

In the matter of:

The Swiss Federal Office of Police Matters ("BAP"), Bureau of International Intergovernmental Cooperation, Division of Appeals;

-- said party being the Appellant.

v.

(1) Fondation M a l e r, address Postfach 183, FL-9490 Vaduz;

(2) A r e l m a Inc., Panama City, Panama;

said parties (1) and (2) being the lead Appellees, and being represented by attorney Peter J. Marz, Bellerivestrasse 201, Zurich;

(3) Bezirksanwaltschaft IV of the canton of Zurich

[(the district public prosecutor's office for district IV of said Swiss canton)], Bureau 1 thereof;

(4) Staatsanwaltschaft of the canton of Zurich

[(office of the chief public prosecutor of the canton of Zurich)],

represented by Chief Cantonal Public Prosecutor Dr. Müller;

(5) Superior Court of the Canton of Zurich (Obergericht), Third Panel for Criminal Law Matters thereof; and

(6) Republic of the P h i l i p p i n e s;

represented by attorney Dr. Martin Kurer, of Walder Wyss & Partner, address Münstergasse 2 (Postfach 4081), Zurich.

Re: Letters Rogatory with the Republic of the Philippines as the requesting State, B 65471/29.

[Translator's note: In view of the breadth of the Letters Rogatory here, "Rechtshilfe" will be hereinafter translated as "request for intergovernmental cooperation".]

History:

A.

In April 1986, the Republic of the Philippines made a formal request for cooperation [(possibly in the form of Letters Rogatory)] to the Swiss Federal Office of Police Matters ("BAP"), in connection with its (ROP's) effort to recover assets which Ferdinand Marcos, his relatives, and his close associates allegedly had unlawfully appropriated in the exercise of

their public functions. Based on this formal request, in the Swiss cantons of Zurich, Freiburg (Fribourg), and Geneva, inter alia, assets of various trusts, foundations, and companies were frozen -- by the [bank] Sweizerischer Bankverein (SBV) in Geneva and Freiburg, and by the [bank] Sweizerischer Kreditanstalt (SKA) in Zurich, and it was agreed to divulge account information to [the government of] the Philippines (for details, see Swiss Federal Court Reporter BGE 116 Ib 452, pp. 454 ff.).

[Translator's note: In this translation the terms "frozen", "freeze", "sequestered", and "sequester have been selected, over other terms such as "detained", "blocked", etc.; except that a decision to detain assets which have been previously ordered to be transferred is referred to as a "detention" decision.]

There were appeal decisions (Rechtsmittelentscheide) concerning certain directives and orders issued by the Freiburg Investigating Judge and the Office of the District Public Prosecutor of Zurich, which appeal decisions were appealed to the Federal Court (Bundesgericht) [(viz. another panel of this Court)] by the heirs of Ferdinand Marcos (deceased Sep 28, 1989) and further by Imelda Marcos, Aguamina Corporation, and the trusts "Palmy", "Avertina", and "Vibur". On Dec 21, 1990, the Federal Court issued two decisions simultaneously. The Federal Court ordered the transfer of the bank information collected from SBV in Freiburg and from SKA in Zurich, under the condition that the requesting State first submit an express and unambiguous statement binding itself to grant to the accused the minimal rights and guarantees which are provided under the Swiss Federal Constitution (BV) and the European Convention on Human Rights (EMRK),

and to heed the "principle of special circumstances" enunciated in Art. 67 of the Swiss Federal Statute Concerning International Intergovernmental Cooperation in Criminal Cases of Mar 20, 1981 ("IRSG"; SR 351.1). The Federal Court also ordered [lit., "permitted"], in essence, that all of the property which had been frozen at SBV Freiburg and SKA Zurich be transferred [to the requesting State], but with a stay of execution [on the final disposition of the property] until a final and dispositive decision is issued by the Sandigbayan [(evidently Philippine supreme court for criminal matters)] or another lawfully competent Philippine court in [such] criminal matters, which decision provides either for restoral of the funds to the rightful holders thereof or for forfeiture of the funds (BGE 116 Ib 452, Opinion Item 5, pp. 459 ff.). In this connection, the following was provided (German-language version of the Judgment):

> "If the requesting State is to institute a procedure toward this end, it must do so within one year from the issuance of the present Decision of the Federal Court, and if it fails to meet this deadline then the assets shall be unfrozen at the request of the interested parties [therein]. Moreover, any such procedure must satisfy the requirements of Art. 4 of the Swiss Federal Constitution (BV), Art. 58 of BV, and Art. 6 of the European Convention on Human Rights (EMRK)."
>
> "A further condition [which this Court imposes] is that, prior to execution of any decision concerning restoral of the money to its rightful holders or concerning forfeiture of the money, the authorities of the requesting State must issue a statement which states

clearly whether the present Decision has been implemented via an appropriate proceeding which meets the abovestated formal requirements, and whether the content of such decision, is not 'contrary to Swiss public order' [i.e. offensive to Swiss law]."

The Geneva Investigating Judge adjusted the orders he had issued re the intergovernmental cooperation, so that such orders would be compatible with the [aforesaid] Decision of the Federal Court of Dec 21, 1990.

History. B.

In an Order dated May 23, 1991, the Federal Office of Police Matters (BAP) designated the canton of Zurich as the "lead canton" pursuant to the Statute on Intergovernmental Cooperation (IRSG), and as the canton responsible for [implementing etc.] the decisions which may occur [(in any court etc.)] subsequently to the Decision of the Federal Court of Dec 21, 1990 (see BGE 119 Ib, pp. 56 ff.) in the matter of the request for intergovernmental cooperation in re Marcos. In an Order dated Feb 06, 1992, the District Public Prosecutor's Office of Zurich made the determination that in the meantime six criminal complaints had been filed (against Imelda Marcos-Romualdez) in the Sandiganbayan court, and that these qualified as proceedings which (as discussed above) were required to be filed in a competent court within the prescribed one year period, which proceedings are such as putatively will lead to an adjudication of the rights of the accused and which putatively will afford the accused an opportunity to participate in the process in an unconstrained manner. This Order was not opposed or appealed.

History. C.

On Aug 10, 1995 the Republic of the Philippines filed an "Additional Request for Intergovernmental Cooperation" (aka Mutual Assistance) via the Presidential Commission on Good Government [(a Philippine agency)] (PCGG). A petition was filed requesting that the assets which had been frozen in Switzerland be preliminarily transferred to an escrow account of the Philippines National Bank (PNB), prior to the obtaining of a final and dispositive decision in the Philippines.

The District Public Prosecutor of Zurich responded favorably to that Request, and in three separate Orders dated Aug 21, 1995, ordered [the custodian banks] to preliminarily transfer the property to which Imelda Marcos and the heirs of Ferdinand Marcos had formal or economic claims, to the requesting State. The banks involved, viz. SBV in Geneva and in Freiburg, and SKA in Zurich, were served notice [of said Orders], and the assets were transferred in the context of the [prescribed] obligations of the Republic of the Philippines and PNB, pursuant to an "Escrow Agreement" of Aug 14, 1995.

History. D.

Fondation Maler, Arelma Inc., other owners of the subject accounts, the banks, the estate of [Ferdinand] Marcos, Imelda Marcos-Romualdez, and the following two holders of prejudgment writs of attachment:

-- Golden Budha Corporation [sic]; and

-- the firm Anderson, Hibey & Blair;

filed appeals against the Orders of the District Public Prosecutor's Office dated Aug 21, 1995. On Feb 20, 1997 the

Superior Court [of the canton of Zurich] issued 9 decisions. The appeals of the banks were dismissed for lack of evidence of authority to sue. Nonetheless the three Orders of the District Public Prosecutor of Aug 21, 1995 were overruled, on the basis of the appeals of the other appellants. The Superior Court ruled that the conditions prescribed in the Decisions of the Federal Court of Dec 21, 1990, viz. the conditions precedent to a transfer, ought to have been complied with and ought to continue to be complied with.

History. E.

The 6 decisions of the Superior Court favoring the appeals [against the aforesaid Orders] were appealed by the BAP to the Federal Court, as an administrative law appeal. The BAP requested that the decisions be reversed, and further that the condition requiring a final and dispositive decision of the Philippine court before the subject property could be transferred, which condition was set forth in the Decision of the Federal Court of Dec 21, 1990, be eliminated. Therewith the BAP sought to have the subject property which had been frozen in Switzerland be immediately executed upon [i.e. be transferred to the Philippine government], with the exception of a certain portion thereof to be determined [then or shortly thereafter] by the Federal Court.

The just-described administrative law appeal is the present appeal, seeking to overturn the appeal decision [of the Superior Court of the canton of Zurich]. That decision below was based on the appeal

petition below of Fondation Maler and Arelma Inc. Those appellants (here Appellees) request that the appeal [of the BAP] be denied, and request further relief as follows:

> "2. In the alternative (absent complete vacation): The preliminary transfer of the property of the Appellant to the Republic of the Philippines shall be permitted only after compliance with all of the following preconditions:
>
> -- "That the Republic of the Philippines fully guarantees [(against expropriation)] all of the claims for restoral which have been asserted by the Appellant, ensuring full restoral [(in the event Appellant eventually prevails)] or at least full monetary compensation for the value of said property;
>
> -- "That this guarantee be implemented prior to the transfer of the assets, namely that the guarantee be in the form of a guarantee of a Swiss bank or by escrow deposit of [suitable] securities;
>
> -- "That the Republic of the Philippines is obligated not to have control over the transferred property unless and until a final, dispositive, and enforceable decision (judgment) has been issued by the Sandiganbayan or another lawfully competent Philippine court in the related criminal cases, wherewith the procedure underlying such decision shall satisfy the requirements of Arts. 4 and 58 of BV, and Art. 6 of EMRK, and the Swiss enforcing authorities shall have verified this and shall have performed monitoring to determine that

the decision is not 'contrary to Swiss public order', and further all of these facts shall be confirmed in writing by the Republic of the Philippines;

-- "That within 7 years from the issuance of the [present] Decision of the Federal Court, the Republic of the Philippines shall have finalized the procedure in the Philippines whereby the assets are either transferred to the rightful owners or are forfeited, such finalization being in the form of a final, dispositive, and enforceable decision (judgment), and the Republic of the Philippines shall have duly submitted said decision to the Swiss enforcing authorities who are to confirm that the above-described formal requirements have been met; and if these conditions be not met then the transferred property shall be restored to the present Appellees, and/or a declaration shall be issued [by the Republic of the Philippines] that the surety posted shall revert to the present Appellees;

-- "That all of the foregoing conditions shall be communicated to the Republic of the Philippines in a formal diplomatic note, and an appropriate diplomatic receipt shall be obtained from the Republic of the Philippines acknowledging receipt of said note."

"3. In the alternative (absent complete vacation): In any event, any preliminary transfer of assets shall be limited in amount to at most 90% of the total."

The Office of the District Public Prosecutor, the Office of the Chief Cantonal Public Prosecutor, and the [Cantonal] Superior Court all waive further pleading. ("Vernehmlassung"). The Republic of the Philippines itself supports the appeal petition of the Appellant,

Opinion of the Court:

1.

The presently appealed Decision of the [Cantonal] Superior Court of Zurich is a "final decision in the last instance" (decision exhausting available appeals below the present Court), and is adverse to the present Appellant. It relates to the Request for Intergovernmental Cooperation presented by the Philippines, dated Aug 10, 1995, which pursuant to Art. 80f Para. 1 of IRSG is eventually appealable to the Federal Court as an administrative law matter (see especially Opinion Items la and lb of the Federal Court Decision of Dec 10, 1997 in BAP v. Aguamina Corp.). The BAP has standing to bring the present Appeal by virtue of Art. 25 Para. 3 and Art. 80h(a) of IRSG. The other prerequisites to bringing the appeal being also satisfied, the administrative law appeal is accepted for decision.

2.

As discussed in more detail in the Federal Court Decision in BAP v. Aguamina Corp. (Opinion Item 3 thereof), the holding and judgment of the Federal Court Decision of Dec 21, 1990 is not adverse to the new Request for Intergovernmental Cooperation presented by the Philippines. This is applicable in the present case as well, because the decisions of the Geneva Investigating Judge re the Request for Intergovernmental Cooperation concerning the accounts

of Fondation Maler and Arelma Inc. at SBV Geneva have not been judicially reviewed.

3.

Based on the Decision of the Federal Court of Dec 21, 1990, it is res judicata that the property which has been frozen in Zurich and Freiburg is deemed the fruit of ("profit or loss from") criminal activity pursuant to Arts. 74a Paras. 1 and 2(b) of IRSG, and ought to be essentially completely transferred to the Republic of the Philippines for determination as to whether said property shall be returned to its rightful owners or be forfeited. The same threshold situation applies regarding the Orders the Geneva Investigating Judge affecting the accounts of the present Appellees in SBV in Geneva, which orders were not appealed [and therefore became final]. According to Art. 74a Para. 3 of IRSG, a transfer may take place at any stage of the foreign procedure, [but] "as a rule, [it must be] based on a final, dispositive, and enforceable decision [i.e. court decision] of [i.e. in] the requesting State". Nonetheless, pursuant to Art. 74a Para. 4 of IRSG, the property may be detained in Switzerland if for the sake of protection of certain rights of third parties against the injury which might be caused by immediate transfer. If a rightful owner asserts a claim for the property under these circumstances, its release can be delayed until said owner's legal entitlement can be clarified, wherewith if and only if certain preconditions set forth in the statute are satisfied then the property can be transferred to said owner (Art. 74a Para. 5 of IRSG). In the light of this provision, in the present case an inquiry must be undertaken as to whether the preconditions for a preliminary transfer of the frozen property [to the Philippine government] are

satisfied as per Art. 74a Para. 3 of IRSG -- i.e. whether [the Swiss intergovernmental cooperation authorities] may waive the requirement of a final, dispositive, and enforceable decision (judgment) of the requesting State (see Items 4 and 5 of the present opinion, infra). If (and only if) these conditions are satisfied, the further question is interposed as to whether there are any rights of third parties pursuant to Art. 74a Para. 4 of IRSC which require detention of the property [in Switzerland] (see Item 6 of the present opinion, infra). Finally, it must be taken into account that Art. 74a of IRSG is formulated as an enabling provision ("can" provision). Even if all statutory preconditions are satisfied, the Swiss intergovernmental cooperation authorities are not obligated to perform the requested transfer. They have the discretion to decide the matter, although in so doing they are subject to certain requirements (see Item 7 of the present opinion, infra).

4.

Art. 74a Para. 3 of IRSG requires that there be in effect a final, dispositive, and enforceable decision of the requesting State; however it is possible to waive this requirement under certain circumstances. The statute leaves the waiver decision to the authorized governmental authorities. Thus a preliminary transfer remains the exception and not the rule. We will proceed hereinbelow to discuss the applicable legal criteria for deciding between the rule [(sequestration in Switzerland)] and the exceptions (preliminary transfer as requested by the Philippine government)].

(4a) As the Federal Court discussed in detail in the Decision of Dec 10 [, 1997] in BAP v. Aguamina [Corp.] (Opinion Item 4 thereof), the requirement of a final and dispositive decision of [a court of] the requesting State (Art. 74a Para. 3) serves first of all to clarify what the factual and legal situation is: The decision between restoral and forfeiture is a determination as to whether the frozen property was acquired with criminal taint, and further as to who is legally entitled to the property; and the court Decision will include an order as to the disposal of the property (viz. restoral or forfeiture). In the process, the factual situation is resolved and clarified, and a definitive decision is rendered as to the possibility [sic] of forfeiting the property or restoring it [to certain claimants], in accordance with the law of the requesting State. On this basis, as a rule the [Swiss] intergovernmental cooperation authorities can then order the transfer of the frozen property.

(4b) The condition requiring a final and dispositive decision [in the Philippines] also enables [(and requires)] monitoring [by Swiss authorities] to ensure that the restoral of the frozen property to the injured parties (or the forfeiture of said property) occurs on the basis of a judicial procedure which is in accord with the procedural fundamentals set forth in the EMRK and in the International Compact on Civil and Political Rights of Dec 16, 1966 (UNO Compact II; SR 0.103.2), and that the foreign decision is not "contrary to Swiss public order" and does not violate internationally guaranteed human rights. There is no requirement for substantive monitoring, e.g. monitoring to verify whether the foreign decision is well reasoned. It follows that, in the case of a preliminary transfer, assurance must be provided that a

court decision will be arrived at in the requesting State about the fate of the property in a manner (of judicially arriving at such decision) which is compatible with the minimum requirements of EMRK and UNO Compact II.

(4c) Regarding the issue of when an "exceptional case" pursuant to Art. 74a Para. 3 of IRSG may be deemed to occur, this depends on the specific facts. The facts must reveal unusual circumstances, which justify overriding of the condition precedent that a final and dispositive court decision be rendered. The statute itself does not directly indicate which grounds in general might justify such an exception. The cases which came up in this Court's deliberations were examples [(e.g. in legislative history)] in which it was sought to ascertain the intent of the legislature. In this regard, the [Swiss] intergovernmental cooperation authorities have a certain amount of discretion which they may exercise. The statute does impose constraints, however: Any granting of exceptions must not lead to a situation wherein the objectives sought to be achieved by the requirement of a final and dispositive decision are evaded.

(4d) This [(the intense concern for upholding the requirement of a final and dispositive court decision in the requesting State)] is not applicable in a case in which clear circumstances are Present indicating that the property is the fruit of, criminal activity, such that a further proceeding to establish the basis for denying restoral would be all but superfluous. The Federal Court, based on Art. 74a Para. 3 of IRSG, ruled that it was permissible to preliminarily transfer a fine art painting to a requesting State (namely France) requesting intergovernmental coop-

eration. The painting had been stolen from its rightful owner in France and had been subsequently sold in Switzerland. Because there was no question that the painting [in its status in Switzerland] was the fruit of criminal activity as per Art. 74a Para. 2(b) of IRSG, the Swiss Federal Court held that the requirement for a formal decision process in the requesting State, as to restoral or forfeiture, could be waived (BGE 123 II 134, Items 5c and 5d of the court's opinion, pp. 140 ff.; see also BGE 123 II 268, Item 4a of the court's opinion, p. 274). In contrast, there is a fundamental resistance to assertion of an "exception" if there is not clear evidence in hand of the criminal origin of the subject property. It is not the function of the Swiss intergovernmental cooperation authorities to resolve these questions; rather, a judicial proceeding in the requesting State is required prior to the transfer (BGE 123 II 268, Item 4b of the court's opinion, pp. 274 ff.). Where the criminal origin of the property is very evident, the interest of the State which is the object of the request [(here Switzerland)] in the right to subsequently monitor the compliance with elementary due process guarantees in the disposition of the property (here the choice being between restoral to the rightful owners and forfeiture) is limited. This interest may be diminished in importance in particular cases, and may permissibly be overbalanced by other interests, whereby a waiver of the requirement for a prior due process decision for restoral (or forfeiture) is justified. In any event, assurance must be provided that the ultimate decision for restoral of the property to its rightful owners (or forfeiture of the property) will be in a judicial procedure which is in accord with the EMRK and/or with UNO Compact II.

5.

In view of the conceptual framework laid out above, the following appears appropriate for the present case:

(5a) As discussed in the Decision of Dec 10, 1997, it is in the interest of Switzerland to be able to transfer the Marcos funds as requested, as soon as possible. This objective is served by preliminary return [sic -- i.e. to the Philippine government] of the property.

(5b) The unlawful origin of the frozen funds cannot be sincerely doubted based on our current state of knowledge. However, according to the record it is not possible to associate particular items of property [(accounts and the like)] with specific crimes; accordingly it is also possible that lawful funds of the Marcos family also found their way into the trusts. As to the amount of such lawful funds, they may be small in relation to the total amounts frozen -- as the present Appellant has ably argued. For most of the frozen assets, there is sufficient certainty that one may characterize them as fruits of criminal acts. Therefore one cannot a priori exclude preliminary transfer of the property, provided that assurance is provided that the decision as to restoral (or forfeiture) will be generated in a due process proceeding. The resolution of the issues relating to restoral (or forfeiture) of the frozen property must be carried out in the Philippines, which is the situs where the alleged criminal acts were committed.

(5c) Pursuant to Art. 2(a) of IRSG, a request for intergovernmental cooperation shall not be granted if there are grounds to conclude that the

procedure in the foreign country will not satisfy the due process requirements set forth in the EMRK or UNO Compact II. If the requesting State is not a "contracting state" to the EMRK, then in general one should rely on UNO Compact II to the extent that the latter provides protections comparable to those of the EMRK (BGE 123 II 511, Item 7d of the court's opinion, pp. 525 ff.). As mentioned hereinabove, in the event of a preliminary transfer, pursuant to Art. 74a Para. 3 of IRSG, assurance must be, provided that in the specific case the basic rights afforded by international law will be respected, in particular the due process guarantees pursuant to UNO Compact II. Accordingly, in the present case the requesting state must guarantee [in writing] that the judicial procedure used to determine whether the property will be restored or forfeited will satisfy the requirements of Art. 2 of IRSG. As discussed in more detail in the Federal Court Decision of Dec 10, 1997, [the Swiss government is justified in assuming that such a guarantee provided by the Philippines can be relied upon.

(5d) As discussed supra, most of the frozen property is fairly evidently the fruit of criminal activity, and the Swiss government has a substantial interest in Preliminary return of the Property [to the Philippine government]. Accordingly, based on Art. 74a Para. 3 of IRSG, the requirement for a final, dispositive, and enforceable decision [of the Philippine courts] may be waived, with the proviso that the Philippines government must guarantee that the decision as to restoral to the rightful owners (or forfeiture) of the property will be arrived at solely by a judicial procedure which satisfies the due process requirements of UNO Compact II. This means in particular that not only must the procedural rights of

the accused be guaranteed but also the procedural rights of the present Appellees who are formal custodians of the property.

(5e) Contrary to the argument of the present Appellees, subsequently to the revision of IRSG it is no longer necessary for the decision for restoral or forfeiture to be made in a criminal court. Art. 74a of IRSG requires merely that the restoral or forfeiture relates to property acquired through criminal activity (Para. 2) and is judicially ordered (Art. 74a Para. 3 of IRSG in combination with Art. 14 of UNO Compact II). It is irrelevant whether the procedure be a criminal procedure versus the accused or a separate procedure, and whether the jurisdiction be that of a criminal court, a civil court, or an administrative law court. Therefore it is not relevant that the Philippines characterized the forfeiture proceeding before the Sandiganbayan court as a "civil case" and that the case [in the Philippines] is being conducted under the rules of civil procedure.

6.

Assuming that preliminary transfer of the property is fundamentally possible, we must still inquire as to whether any rights of third parties pursuant to Art. 74a Paras. 4-5 of IRSG would be violated by the immediate such transfer.

(6a) The present Appellees invoke Art. 74a Para. 4(c) of IRSG. It is their view that, said Para. 4(c) should be relied upon because the parties in interest are not persons involved in a criminal proceeding. The description of the protected persons in Art. 74a Para. 4(c) of IRSG resembles the persons described in Art. 10 Para. 1 of IRSG (prior version prior to amendment), which protects the confidentiality

rights of "uninvolved third parties". The Federal Court has developed a very restrictive doctrine in this connection, according to which it is irrelevant whether the third party should be deemed a participant in the criminal acts in the sense of being a criminal defendant; rather, the test is whether there is a direct relationship between the given third party and the actions outlined in the request for intergovernmental cooperation (BGE 112 Ib 462, Opinion Item 2b, pp. 463 ff.; BGE 107 Ib 252, Opinion Items 2b and 2b(bb), p. 255). According to the holdings in these prior cases, a person who receives property which is the fruit of criminal acts essentially cannot be deemed an "uninvolved third party", regardless of whether the receiving of the property was in good faith (BGE 111 Ib 129, Item 3 of the court's opinion (not printed in the Reporter version)). These holdings do not directly apply in a situation according to Art. 74a Para. 4(c) of IRSG, which seeks to protect a good faith holder in due course of property subject to forfeiture. There must be an inquiry as to whether the third party is truly independent and not merely an intermediary of the accused, e.g. a merely formally independent juridical person which is in fact controlled by the accused, wherewith it is the accused who has ultimate power of disposition of the property which is the fruit of criminal acts (or substitute property therefor). In such circumstances the "good faith" status of the juridical person ought to be denied, in that the bad faith of the accused should be and is imputable to said juridical person. In the present case the Appellees are nominally the rightful owners of the disputed bank accounts; however, these entities were formerly controlled by Ferdinand Marcos, who had the actual power of disposition over the property, despite the formal legal independence

of the trust and the company [(Fondation Maler and Arelma Inc.)]. The present Appellees have not disputed these facts, nor have they credibly presented argumentation or evidence that the accounts were acquired from Ferdinand Marcos with Appellees as independent good faith acquirers.

[sic] for a pending criminal proceeding in Switzerland or is a subject of possible forfeiture in Switzerland. This issue is raised in the present case, because the Chief Cantonal Public Prosecutor of the canton of Geneva imposed protective orders of sequestration, pursuant to cantonal law, on the accounts of [Appellants] Fondation Maler and Arelma Inc. in SBV, Geneva, on Dec 20, 1990. In his letter to SBV, the Chief Cantonal Public Prosecutor stated the following:

> [in French:] "Obviously, if the competent authority for granting the request for intergovernmental cooperation (Letters Rogatory) orders the property subject to the measures in force [(viz. sequestration orders)] transferred to the Republic of the Philippines, the present sequestration is without a subject; you may execute the instructions of that [higher] authority without a new decision on my part. If, however, such transfer to the requesting State is refused [by said authority or a court having jurisdiction], you should deem the present sequestration to remain in force, and you must prevent the accounts from being restored to their nominal owners or to any third parties, unless and until the rights [of any such claimant] have been finally adjudicated [(in favor of said claimant)] in the forfeiture proceeding which will ensue."

It is seen from this that the Office of the District Public Prosecutor at Zurich correctly assumed that the Geneva freezing of the property has a subsidiary character, and does not prevent transfer of the property to the Philippines in a proceeding based on a request for intergovernmental cooperation.

7.

Finally, in the scope and context of the general discretion granted to the intergovernmental cooperation authorities pursuant to Art. 74a Paras. 1 and 3 of IRSG the question arises as to whether any rights of other persons not protected by Art. 74a Paras. 4 and 5 of IRSG justify denial of the request for intergovernmental cooperation.

(7a) As discussed in detail in the Decision of the Federal Court of Dec 10, 1997 (Item 7 of the court's opinion), in the present case [this Court] must weigh the interests of persons whose human rights were severely transgressed under the Marcos regime. The [U.S.] District Court of Hawaii on Jan 27, 1995 awarded such persons compensatory and exemplary damages amounting to US$1,964,005,859.90. These persons have claims for indemnity of damages and the right of fair process [sic] in prosecuting said claims, under international law (Arts. 2 and 14 of UNO Compact II, Arts. 14 and 16 of the UN Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Penalties, of Dec 10, 1984 (SR 0.105), and Philippine law (Art. III Sec. 12(4), Art. III Sec. 16 (amended), and Art. XIII Sec. 18(6), of the Philippines Constitution of 1987)). However, this does not create the inference that these persons have priority to have their claims satisfied out of the property which has been sequestered in Switzerland. Victims seeking relief generally must resort to either

a lawsuit versus the estate [of Ferdinand Marcos], if they seek to assert injury due to human rights violations for which Ferdinand Marcos was personally responsible during his period in office, or a lawsuit versus the Philippine government in which they seek indemnification for damages from wrongful conduct by organs of government. Although there is no direct connection between the subject of the intergovernmental cooperation proceedings and the human rights violations which underlie the damages awards by the U.S. District Court in Hawaii, nonetheless there are certain areas of overlap. The plaintiffs in that lawsuit [(in Hawaii)] are creditors of the Estate of Ferdinand Marcos, and as such are affected by any transfer of the property to the Philippines. The outcome of the intergovernmental cooperation proceedings affects their prospects (factually) of receiving damage amounts for the human rights violations which they suffered. On the other hand, the Philippine government is liable for indemnification of the victims, according to international law. The requested intergovernmental cooperation, if granted, will put the Philippine government in a position to decide the disposition of the disputed property which the victims claim as property which can be executed against to satisfy a [(the Marcoses' and other defendants')] liability. Taking into account the totality of the circumstances, it is justifiable to demand from the Philippine government that said government inform the Swiss authorities about the current state of the proceedings [(in the Philippines, in particular -- but may refer also to the proceedings in Hawaii and elsewhere outside the Philippines which give rise to a class of in rem claimants against the property)], and regularly report on all important developments thereconcerning -- not only involving judicial proc-

esses to determine restoral as against forfeiture, but also any arrangements or proceedings in the context of Art. 2 Sec. 2, Art. 2 Sec. 3, and Art 14, of UNO Compact II, or in the context of Arts. 12-16 (especially Art. 14) of the UN Convention on Torture, for compensating victims of human rights violations during the Marcos regime. This information will enable and trigger concurrent monitoring by the Upper House of the Swiss Federal Parliament (Bundesrat), which pursuant to Art. 41 of UNO Compact II, and Art. 30 of the UN Torture Convention must be duly advised of all developments.

(7b) The decision is not altered by the legal proceedings in the U.S. which are connected with the claims for damages of the torture victims, or by the burdens on the Swiss banks which derive from those legal proceedings. As a basis for this [conclusion], reference is made to the Federal Court Decision of Dec 10, 1997 (BAP v. Aguamina Corp.) (Item 7d of the court's opinion).

8.

(8a) It follows from the preceding that it was lawful and proper for the District Public Prosecutor of Zurich to order that the property be returned to the Philippines. However, along with the granting of the request for intergovernmental cooperation it is necessary to attach the condition that the Philippines guarantee that the procedure to determine whether the property will be restored to its rightful owners or will be forfeited will be entirely a judicial procedure which is in accordance with procedural fundamentals set forth in UNO Compact II, and that the Swiss authorities will closely monitor the state of affairs in said procedure and in any arrangements or proceedings to provide relief to victims of human

rights violations under the Marcos regime. The Federal Court has jurisdiction over these conditions, as a matter of first instance at the appellate level (so-called "appellate instance") (Art. 80p Para. 1 of IRSG). The Judgment of the Zurich Superior Court which is being appealed [here] should therefore be reversed; the Orders issued by the Office of the District Public Prosecutor [of Zurich] should be expanded to encompass the aforementioned conditions, and in general said Orders should be confirmed and upheld.

(8b) With this outcome of the proceedings, the present Appellees should bear the court costs (Art. 156 Para. 2 of OG), but neither party should bear the other's general litigation costs (Art. 159 Para. 2 of OG).

THEREFORE the judgment of the Court is as follows:

1. Judgment is granted in favor of the Appellant in this administrative law appeal, and the judgment of the Superior Court of the canton of Zurich of Feb 20, 1997 in the case styled Fondation Maler and Arelma Inc. v. the Office of the Chief Cantonal Public Prosecutor of the canton of Zurich (UK950184) is reversed. The case is remanded to the Cantonal Superior Court for reallocation of the costs of the proceedings in said court.

2. The Orders issued by the Office of the District Public Prosecutor for District IV [(Zurich)] in the canton of Zurich, dated Aug 21, 1995, relating to SBV (Schweizerischer Bankverein) in Geneva are confirmed, and are expanded by the following Conditions:

(2a) The government of the Philippines shall guarantee that the decision concerning the restoral of the subject property to its rightful owners (or the forfeiture of said property) shall be made in a judicial procedure which is in accordance with the basic procedural requirements set forth in Art. 14 of the International Compact on Civil and Political Rights of Dec 16, 1966 (UNO Compact II).

(2b) The government of the Philippines shall inform the Swiss authorities concerning the current status of, and shall regularly report to the Swiss authorities concerning significant developments in:

-- judicial processes relating to the restoral or forfeiture [of the property which is the subject of the present case]; and

-- arrangements or proceedings for providing relief to the victims of human rights violations during the Marcos regime (Art. 2 Sec. 2, Art. 2 Sec. 3, and Art 14, of UNO Compact II, and/or Art. 14 and Art. 16 Sec. 1 of the UN Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Penalties, of Dec 10, 1984).

3. The court costs of 5,000.00 Swiss francs shall be borne by the present Appellees, with allocation among them as among persons having joint and several liability.

4. Copies of the present Judgment shall be transmitted to:

-- BAP (Swiss Federal Office of Police Matters), Bureau of International Intergovernmental Cooperation;

-- The present lead Appellees

[(Fondation Maler, and Arelma Inc.));

-- The District Public Prosecutor's Office of District IV of the canton of Zurich;

-- The Office of the Chief Cantonal Public Prosecutor of the canton of Zurich;

-- The Superior Court of the canton of Zurich; and

-- The Republic of the Philippines.

At Lausanne, Dec 19, 1997.

On behalf of the First Public Law Division of the
Swiss Federal Court.
/s, illegible/, Presiding Judge.

/s, completely illegible Clerk of Court.

[ink seal:] Swiss Federal Court.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Case No. CV00-595-R

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., *ET AL.*,

Defendants.

JUDGMENT

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, having filed the finding of fact and conclusions of law applicable to this case pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The Court orders judgment for claimant Mariano J. Pimentel and the Class of Human Rights Victims in MDL No. 840.

The Court further orders the Clerk of Court to forthwith transfer the interpleaded assets to the ac-

count in the Clerk's Office established in MDL No. 840 subject to further order of this Court.

Dated: July 12, 2004.

s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16503
(Dist. Ct. No. CV00-595MLR)

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

v.

ARELMA INC., *[ET AL.]*,

Appellants.

DEFENDANT-APPELLEE PIMENTEL'S MOTION TO DISMISS THE APPEAL OF NONPARTIES THE REPUBLIC OF THE PHILIPPINES AND PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT

Defendant-Appellee Mariano Pimentel moves this Court to dismiss the appeal filed by the Republic of the Philippines (the "Republic") and its Presidential Commission on Good Government ("PCGG"). Neither the Republic nor the PCGG has standing to appeal under Article III of the United States Constitution or the decisions of this Court since each is a nonparty to this proceeding and the issue they wish to raise has been decided by this Court in their earlier appeal.

I. Background

The Republic and PCGG were named as defendants in an interpleader lawsuit filed by Plaintiff Merrill Lynch, Pierce, Fenner & Smith in September 2000. The lower court dismissed the Republic and PCGG on the ground they were not real parties in interest. This Court upheld the dismissal on the ground that they were entitled to sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002). This Court found these nonparties were "necessary" under FRCP 19(a) based solely on their naked and unsubstantiated claim that Ferdinand E. Marcos misappropriated the assets on deposit with the lower court.

On remand to the lower court and without intervention by the Republic and PCGG, that court made detailed findings of fact, including:

- any claim by the Republic or PCGG would be barred by the applicable statute of limitations.

- expiration of the applicable statute of limitations precludes a "necessary" party from having a legally protectable claim;

- trial of the interpleader action cannot "impair" the Republic's and PCGG's claim; the Republic and PCGG made a strategic decision not to participate in the interpleader litigation even though they participated in over a dozen lawsuits in the United States involving purported Marcos assets; and

- the Republic and PCGG are not indispensable parties to the litigation.

See Ex. A.

Nonparties Republic and PCGG immediately appealed the lower court's interlocutory ruling pursu-

ant to 28 U.S.C. §1292(b). In a Memorandum decision entered February 20, 2004, this Court affirmed the action of the lower court finding that it properly exercised its discretion in concluding that the absence of "necessary" parties did not impair the action from going forward. *See* Ex. B. Following pretrial *in limine* hearings, the lower court conducted a non-jury trial on February 24, 2004 among "the remaining parties to the interpleader. There were no live witnesses. The parties introduced deposition testimony and exhibits. The lower court continued the trial to permit review of the evidence. Following the submission of each party's proposed findings of fact and conclusions of law, the lower court at a hearing on July 12, 2004 read and entered its own findings and conclusions and entered Judgment. *See* Ex. C. Appellee Pimentel and the Class of Filipino Human Rights Victims were awarded the interpleaded assets.

Four (4) days after entry of the lower court's Judgment, nonparties Republic and PCGG filed the instant appeal. *See* Ex. D. In their docketing statement, the sole issue raised is whether the action should have been dismissed in its entirety because the Republic and PCGG were indispensable parties. *See* Ex. E.

II. Argument

It is axiomatic that only parties to an action have standing to appeal under Article III. *Karcher v. May*, 484 U.S. 72, 77 (1987); *United States v. City of Oakland*, 958 F.2d 300, 301 (9th Cir. 1992). The Republic and PCGG, by virtue of their choice and strategy to invoke sovereign immunity, ceased being parties to the litigation in 2002, if not earlier. This Court has held that sovereign immunity entails not only

immunity from liability, but immunity from the burden of participating in litigation. *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir. 1997). Contrary to the very benefit the Republic and PCGG achieved by invoking sovereign immunity, they now wish to meddle in the ongoing litigation and prejudice the rights of 9,539 Filipino human rights victims who have proven their entitlement to the interpleader assets. This they cannot do.

In a case directly on point, this Court held that a party dismissed from litigation has no standing to appeal. *Planned Parenthood of the Columbia/Willamette. Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1014 n.6 (9th Cir. 2001). There a defendant dismissed early in the litigation sought to appeal an injunction. This Court struck the appeal saying "... she has no independent standing to appeal."

While this Court has articulated an exception to the general rule on appellate standing, *see SEC v. Wenke*, 783 F.2d 829, 834-35 (9th Cir. 1986)("exceptional circumstances"), this exception is inapplicable to this litigation. Two years after *Wenke* the United States Supreme Court held that a non-party should have intervened in the litigation in the lower court in order to have standing to appeal a final judgment. *See Marino v. Ortiz*, 484 U.S. 301 (1988) Whether there is any vitality left in the *Wenke* exception following the *Marino* decision is debatable. What can be said with certainty is that where a non-party could have intervened but chose not to do so, *Marino* controls, not the *Wenke* exceptional circumstances test. Here the Republic and PCGG could have waived their sovereign immunity pursuant to 28 U.S.C. 1605(a)(1) or sought to intervene under

Fed.R.Civ.P. 24 but their strategy was to try to shut down the litigation by insisting on immunity.

The lower court specifically found that "[t]he Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets." See Ex___. The lower court relied in part on this Court's decision in *Citibank International v. Collier Traino Inc.*, 809 F.2d 1438, (9th Cir. 1987)(J. Schroeder) where this Court denied standing to appeal to a non-party (instrumentality of Libyan government) that was invited to participate in the lower court proceedings but chose not to. In reasoning that reverberates in this litigation, this Court stated:

> It [appellant] could have either appeared in this action or sued independently to enforce the obligation on the letter of credit. It chose not to do so because it feared subjecting itself to the jurisdiction of the district court on related claims. While we do not fault that strategic election, we must hold that the appellant must accept the disadvantages as well as the advantages that flow from it.

Id at 1441. *See also Washoe Tribe of Nevada and California v. Greenley*, 674 F.2d 816 (9th Cir. 1982)(J. Schroeder participating)(" ... we find no equities in favor of permitting an appeal by the State. The State did not intervene below when it clearly could have."). As nonparties, the Republic and PCGG cannot immunize themselves from the litigation and then selectively participate in the litigation by appealing the results.

Lack of standing would exist even were this Court to apply the *Wenke* exceptional circumstances test. Neither *res judicata* nor collateral estoppel from the lower court's final Judgment will apply to the Republic and PCGG. See Ex. ____. Neither the Republic nor PCGG participated in the trial. While it is certain that neither the Republic nor PCGG have a legally protectable interest in the assets on deposit with the lower court, should either ever obtain a judgment against the Marcoses related to those assets, each has judicially attached assets of the Marcoses in the Philippines that could be used to satisfy a judgment.

Moreover, the sole issue these nonparties wish to raise on appeal — whether they are indispensable parties under FRCP 19(b) — was decided against them in this Court's Memorandum Decision of February 20, 2004. This Court affirmed the decision of the lower court finding that the lower court properly exercised its discretion under FRCP 19(b) in concluding that the absence of "necessary" parties did not impair the action from going forward. This Court's finding is now the law of the case. There is no right to successively appeal the same issue in hope of receiving a different decision. As this Court said in *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979), "[u]nder the law of the case doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."

III. Conclusion

For all the foregoing reasons, the Republic and PCGG's appeal should be dismissed.

Respectfully submitted,

DATED: Aug. 13, 2004

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APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Case No. CV 00-595-R

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff,

v.

ARELMA INC., *ET AL.*,

Defendants.

AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Amendment is to correct an omission in the Finding of Facts filed July 12, 2004.

[Finding] of Fact Fourteen (14) is amended to read as follows:

14. The account of Merrill Lynch was funded by Arelma with a deposit of $2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The Source of those funds was Ferdinand E. Marcos. There is no evidence presented as to where and how Ferdinand E. Marcos obtained the funds when he ordered two million dollars $2,000,000 [deposited] in [account] No. 165-07312 at Merrill Lynch in New York in 1972.

Conclusion of Law is twenty (20) amended to read

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate. The proceeds of the amount of Merrill Lynch deposited in this Court are the property of Ferdinand E. Marcos.

DATED: August 24, 2004.

s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 04-16401, 04-16503, 04-16538

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, * * *

Plaintiff-Appellee,

MARIO PIMENTAL [*sic*],

Defendant-Appellee,

v.

ENC CORPORATION; *ET AL.*,

Defendants,

and

ARELMA, INC., * * *

Defendants-Appellants,

D.C. No. CV-00-00595-MLR
District of Hawaii, Honolulu

ORDER

Filed Oct. 5, 2004

Before: Peter L. Shaw, Appellate Commissioner

The motion to consolidate these appeals is granted. Appeal Nos. 04-16401, 04-16503, and 04-16538 are consolidated.

Appellee Pimental's motion to dismiss appeal no. 04-16503 for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. *See National Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel can consider appellate jurisdiction despite earlier denial of motion to dismiss).

The following briefing schedule shall govern these consolidated appeals: the consolidated opening briefs are due November 1, 2004; the consolidated answering briefs are due November 29, 2004; and the consolidated optional reply briefs are due December 13, 2004. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. *See* 9th Cir. R. 28-4.

s/Peter L. Shaw
General Order 6.3 (e)

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840
No. 86-390
No. 86-330

IN RE:
ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION

THIS DOCUMENT RELATES TO:
Hilao et al. v. Estate of Ferdinand E. Marcos,
and
DeVera et al. v. Estate of Ferdinand E. Marcos.

ORDER

The Court has carefully reviewed Class Counsel's Motion for an Interim Award of Attorneys' Fees and Reimbursement of Expenses, their memorandum and exhibits in support thereof and the letters of class members commenting thereon. The Court orders as follows:

1. The Fund derived from execution on the Judgment in this action has assets of approximately $36.4 million, of which in excess of $1.6 million derives from collections other than in *Merrill Lynch v. Arelma*.

2. The expenses of Class Counsel are approved for partial payment in the amount of $753,000 from non-*Arelma* collections.

3. The fees and expenses of the Special Master, Sol Schreiber, are approved for payment from non-*Arelma* collections upon submission to the Court of a detailed invoice.

4. Class Counsel are awarded interim counsel fees of 10% of the Fund payable upon issuance of the mandate (the "Mandate") of the Court of Appeals per its Order of June 22, 2006 in the appeals in *Merrill Lynch v. Arelma*.

5. Upon issuance of the Mandate, Class Counsel shall distribute the sum of $2,000 to eligible Class members on a *per capita* basis. Eligible Class members are those Class members who submitted claim forms in 1993 and 1999.

Dated: Honolulu, Hawaii, June 26, 2006

BY THE COURT:

s/Manuel L. Real
MANUEL L. REAL
MDL 840 Transferee Judge

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,
Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

This interpleader action was brought to settle ownership of assets of Arelma, Inc., a shell corporation established by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed by the Republic, which maintains that they belong to it under Philippine law because they were acquired through the misuse of public office; by the Philippine National Bank, which now controls Arelma and has agreed to cede ownership in accordance with the decision of a Philippine court; and by a class of private judgment creditors of the Marcos estate. The Republic and its Presidential Commission on Good Government (PCGG) were dismissed from the action on sovereign immunity grounds. In their absence, however, the district court held them not to be "indispensable" parties under Fed. R. Civ. P. 19(b), proceeded to resolve the interpleader action, and awarded the disputed assets to the class of private claimants. The Ninth Circuit affirmed. The case presents the following questions:

Whether the Republic and its PCGG, having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they are not "indispensable" parties under Fed. R. Civ. P. 19(b); and whether they have the right to seek this Court's review of the court of appeals' opinion affirming the district court.

Whether a foreign government that is a "necessary" party to a lawsuit under Rule 19(a) and has successfully asserted sovereign immunity is, under Rule 19(b), an "indispensable" party to an action brought in the courts of the United States to settle ownership of assets claimed by that government.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma, Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

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United Nations Convention Against Corruption, G.A. Res. 4 (LVII), U.N. Doc. A/RES/58/4 (2003) 41, 50

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United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/59/508 (2004) 30

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Brief of the United States as Amicus Curiae in Support of Defendant-Appellant, *Belize Telecom, Ltd.* v. *Gov't of Belize*, No. 05-12641-CC (11th Cir. Oct. 6, 2005), http://www.state.gov/s/l/2005/87217.htm..... 31

C. Chao & C. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147 (2001) 40

Comprehensive Agrarian Reform Law of 1988, Philippine Republic Act No. 6657 (1988) 49

The Federalist, No. 81 (C. Rossiter ed. 1961) (Hamilton) 28

H.R. REP. NO. 94-1487 (1976) 48

B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, pt. 1, 81 HARV. L. REV. 356 (1967) 47

4 J. Moore *et al.*, *Moore's Federal Practice* (2006):

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Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) 49

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a–11a, 12a–20a, and 21a–29a) are reported at 464 F.3d 885, 448 F.3d 1072, and 446 F.3d 1019. The final order of the court of appeals denying petitioners' rehearing petition (Pet. App. 61a–62a) is reported at 467 F.3d 1205. The orders of the district court regarding indispensability (Pet. App. 55a–60a) and granting final judgment (Pet. App. 43a–54a) are unreported.

JURISDICTION

After twice revising its opinion, the court of appeals entered its judgment on September 12, 2006, and denied a timely petition for rehearing on November 3, 2006. On January 24, 2007, Justice Kennedy extended the time for filing a petition for a writ of certiorari to March 5, 2007. The petition was filed on that date and granted on December 3, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULE PROVISIONS INVOLVED

Relevant portions of Rule 19 of the Federal Rules of Civil Procedure, as it existed before December 1, 2007, are reproduced at Pet. App. 63a–64a. Relevant portions of the 2007 revision to Rule 19 are reproduced in an addendum to this brief.

STATEMENT

This case is an interpleader action brought to determine ownership of assets stolen by Ferdinand E. Marcos while he was President of the Republic of the Philippines and secreted in Arelma, S.A., a Panama-

nian shell corporation he created for this purpose. The Republic claims the assets, to which it is entitled under Philippine law. The assets also are claimed by, among others, a class of plaintiffs who were injured by Marcos during his presidency and who obtained a judgment against the Marcos estate in an earlier, unrelated suit. The Republic successfully asserted its sovereign immunity and was dismissed from the interpleader action. In the Republic's absence, however, the district court held that the Republic is not an indispensable party under Fed. R. Civ. P. 19(b),[1] adjudicated the interpleader suit, and awarded the assets in their entirety to the class of Marcos creditors. The Ninth Circuit affirmed, holding that the Republic's sovereign immunity did not bar the suit from proceeding or prevent disposition of the assets claimed by the Republic.

This holding departs from Rule 19 in several fundamental respects. That Rule permits courts to take account of compelling substantive interests such as sovereign immunity. In addition, and wholly apart from the Republic's immunity, the approach taken below guarantees an inequitable result either by denying a hearing to a party with a substantial claim to disputed assets or by subjecting an interpleader stakeholder to duplicative litigation and liability. This outcome is especially troubling because the Ninth Circuit's disposition directly interferes with

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[1] While the petition for a writ of certiorari was pending, a revised version of Rule 19 went into effect. The revisions were described by the Advisory Committee as "stylistic only." Because the decisions of the lower courts in this case made use of the old terminology, as does the question posed for the parties by the Court, this brief generally does so as well, although it notes the changes where relevant.

the vital national interests of an important ally of the United States and threatens to undermine broader international efforts to combat official corruption. The decision below accordingly should not stand.

1. In 1986, a popular uprising—the "people power" revolution—overthrew Ferdinand Marcos as President of the Philippines. Under Philippine law, assets derived from misuse of public office are forfeit to the Republic from the moment they are appropriated (see Rep. Act No. 1379, 51:9 O.G. 4457 (June 18, 1955)).[2] The Republic accordingly set out to recover the vast sums stolen by Marcos during his 20-year tenure as President. As her first act in office, the Republic's new President, Corazon Aquino, created the Philippine Presidential Commission on Good Government (PCGG), which was given responsibility for locating and recapturing assets that had been wrongfully acquired by Marcos. Reclaiming such assets is one of the Philippine government's most urgent priorities: the Republic has informed the United States Department of State that the "recovery of [Marcos's] ill-gotten wealth" is "a preeminent responsibility of the Philippine government" that "represents a national interest of the Republic that is of the highest order." Pet. App. 65a.

The PCGG's mission took it to Switzerland, where Marcos had secreted much of his misappropriated property. At the PCGG's request, the Swiss gov-

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[2] U.S. forfeiture law is similar. See, *e.g.*, 18 U.S.C. § 1963(c) (under Racketeer Influenced and Corrupt Organizations Act, "[a]ll right, title, and interest in [forfeited] property * * * vests in the United States upon commission of the act giving rise to forfeiture under this section").

ernment froze Marcos-related assets pending the outcome of civil and criminal proceedings against Marcos and his estate in the Philippines. Republic's Court of Appeals Excerpts of Record (CA9 E.R.) 288, 313, 348–349. Ultimately, because the Swiss Federal Supreme Court found no reasonable doubt that Marcos had obtained his Swiss assets illegally, the court held in 1997 and 1998 that the assets should be transferred to an escrow account at the Philippine National Bank (PNB). See JA 69, 86 (reproducing *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc., et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997)).[3] The Swiss court conditioned these transfers on the Republic's guaranteeing that the eventual allocation of the assets would be made in accordance with the outcome of Philippine judicial proceedings between the Philippine government and the Marcos estate. See *id.* at 80. The PCGG and PNB accordingly entered into escrow agreements obligating PNB to dispose of the repatriated property as directed by a final judgment of the appropriate Philippine court determining the assets' rightful owner. CA9 E.R. 150–155.

In the Philippines, the PCGG in 1991 brought a forfeiture action regarding the Swiss assets before the Sandiganbayan, an anti-corruption court with exclusive jurisdiction to resolve issues relating to property allegedly pilfered by Marcos. CA9 E.R. 106, 174–251. Marcos's widow, Imelda Marcos, and the Marcos estate have been fully represented in these

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[3] See also *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

proceedings. In 2000, the Sandiganbayan ruled that the Swiss assets belong to the Republic. The Sandiganbayan subsequently set aside its judgment on technical grounds, but the Philippine Supreme Court reversed, ruling in the PCGG's favor. *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003).

2. This case involves a dispute about ownership of a subset of the Marcos assets sent by Swiss authorities to be held in escrow by PNB. In 1972, Marcos created and transferred $2 million to Arelma, S.A., a Panamanian corporation with two outstanding shares that, prior to 1998, were held in Switzerland. Arelma invested the funds with Merrill Lynch, Pierce, Fenner & Smith, Inc., in New York, and by 2000 that investment had grown to approximately $35 million. Following the initial freeze of Marcos-related property in 1986, Swiss authorities identified Arelma as a repository for Marcos's assets; Swiss police officials subsequently included Arelma's share certificates among the assets transferred to PNB to be held in escrow pending final determination of ownership by the Philippine courts. Pet. App. 7a, 49a–50a. Pursuant to this transfer, the share certificates are now in the Philippines.[4]

The forfeiture action brought by the PCGG in the Sandiganbayan specifically listed Arelma and the Merrill Lynch account as the proceeds of illegal activity that have at all times belonged to the Philippine government. CA9 E.R. 106, 174–251. Although the

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[4] That transfer made PNB the sole shareholder of Arelma, with exclusive authority under Panamanian law to elect officers and directors and to determine the disposition of the corporation's assets.

Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding Marcos's Swiss property, it did not expressly mention Arelma. The PCGG therefore has filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law, is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. In July 2000, while the Marcos-related litigation was pending in the Philippine courts, the PCGG asked Merrill Lynch to surrender the Arelma assets to PNB, to be held in escrow pending final determination of ownership. Merrill Lynch declined to do so, "apparently because of the existence of other claimants" (Pet. App. 31a)—most notably, a class of thousands of victims of the Marcos regime (the Pimentel class) who had obtained a near-$2 billion judgment against the Marcos estate in the U.S. District Court for the District of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Evidently at the direction of Judge Real, the district judge who had presided over the Pimentel class action, Merrill Lynch ultimately initiated this interpleader suit in the District of Hawaii to resolve competing claims to the Arelma assets.[5] The named defendants in the action

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[5] Merrill Lynch initially stated that it would await the outcome of the Sandiganbayan proceedings before surrendering the Arelma assets. CA9 E.R. 393–395. When the Pimentel class asserted ownership of the assets, however, Judge Real directed Merrill Lynch to appear before him and instructed the firm to commence an interpleader proceeding not in New York, where

came to include the Republic; the PCGG; PNB; Arelma; Marcos heirs and others who assert a right to act for Arelma; and judgment creditors of the Marcos estate, among them the Pimentel class. See Pet. App. 31a.[6]

The Republic, the PCGG, PNB, and Arelma sought dismissal of the interpleader action. As a foreign sovereign and its instrumentality, the Republic and the PCGG (referred to collectively as "the Republic") asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604. Invoking Federal Rule of Civil Procedure 19, each of the interpleader defendants maintained that the unavailability of the Republic required dismissal of the action. The Republic was a "necessary" party to the suit within the meaning of Rule 19(a)(2), they argued, because adjudication of the interpleader action would impair its ability to protect its claim to the Arelma assets. The Republic was an "indispensable" party within the meaning of Rule 19(b), the argument continued, because resolution of the interpleader action effectively would render meaningless its assertion of immunity by resolving ownership of assets in which it claimed an interest. See Pet. App. 31a–32a.

Merrill Lynch is headquartered and where the funds were held, but in Hawaii. *Id.* at 31–32.

[6] The Marcos creditors also include the estate of Roger Roxas and the Golden Budha [*sic*] Corporation, which had obtained a substantial judgment against Imelda Marcos in Hawaii state court. See Pet. App. 3a. The Roxas estate and Golden Budha Corporation also filed a petition for a writ of certiorari challenging the Ninth Circuit's decision in this case (No. 06-1039), which remains pending.

Instead of addressing the Republic's claim of sovereign immunity, however, the district court effectively ruled against the Republic *on the merits*, holding that it was not a "real part[y] in interest" in the interpleader action. See Pet. App. 32a. Judge Real thus dismissed the Republic from the suit on the ground that it was neither necessary nor indispensable under Rule 19 because it had no enforceable claim to the Arelma assets. The district court enjoined the Republic from bringing further actions in the United States to pursue the assets. See *id.* at 32a–33a.

The Republic appealed and the Ninth Circuit reversed. Pet. App. 30a–42a. The court held that since the Republic asserted immunity from suit under the FSIA, the district court should have granted its motion to dismiss on that ground. *Id.* at 39a. Given that immunity, the district court had no authority to inquire into the merits of the Republic's claim. Turning to Rule 19 and disposition of the interpleader action, the court held that the Republic is a "necessary" party under Rule 19(a) because it has a claim to the assets at issue in the litigation—a claim the court labeled "substantial." *Id.* at 41a. In addition, the Ninth Circuit noted that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence" under Rule 19(b). *Ibid.*[7]

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[7] PNB and Arelma supported the Republic's Rule 19 arguments, noting that they could not represent the interests of the Republic—in Arelma's case because it "would have rights in those assets if, but only if, they are *not* owned by the Republic," Arelma/PNB Br., at 3, available at 2002 WL 32102117 (emphasis in original), and in PNB's case because, as an escrow agent, it "would have a [*sic*] irreconcilable conflict were it to act on be-

Rather than dismiss the action outright, however, the court, with the Republic's consent, ordered that the suit be stayed pending resolution of litigation in the Philippines regarding ownership of the Arelma assets. *Id.* at 42a.

4. On remand, the district court promptly dissolved the stay. Judge Real ruled that the Republic, now absent from the litigation because it had been dismissed on sovereign immunity grounds, was not an indispensable party within the meaning of Rule 19(b). Pet. App. 55a–60a. The court so held by, again, addressing the merits of the Republic's position, ruling this time that the Republic has "no legally protectible interest in the assets at issue in this proceeding" because any claim it brought for the Arelma funds held by Merrill Lynch in the United States would be time-barred. *Id.* at 57a. The court did not separately address the arguments raised by PNB and Arelma as to why litigation could not proceed in the absence of the Republic. CA9 E.R. 268–285; JA 4. Without the participation of the Republic, the court proceeded to adjudicate entitlement to the Arelma assets, awarding them in their entirety to the Pimentel class. *Id.* at 43a–54a.

5. On appeal, the Republic challenged the district court's Rule 19 decision, as did PNB and Arelma.[8] The Ninth Circuit affirmed. Pet. App. 1a–11a, 12a–20a, 21a–29a. In its initial opinion (*id.* at 21a–29a), the court began by opining that the indis-

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half of one of the parties to the escrow, particularly where, as here, PNB is required to transfer the assets to whomever is found to be entitled to them by the Philippine courts." *Id.* at 11 (citations omitted).

[8] See Arelma/PNB Br. at 42–44, available at 2004 WL 3493816.

pensability test of Rule 19(b) is shaped by considerations of "fairness and the moral weighing that should attend the judge's choice of solutions." *Id.* at 25a. Applying this standard, the Ninth Circuit noted that many years had gone by since the Arelma assets were placed in escrow and "the Republic has not obtained a judgment that the assets in dispute belong to it." Although the court did "not hold the Republic guilty of laches"—it hardly could have, as the PCGG has been diligently pursuing Marcos's assets around the world and in the Philippine courts for the last twenty years—the court regarded the Republic's "failure to secure a judgment affecting these assets" as an equitable "factor to be taken into account." Pet. App. 26a.

The court also "note[d] the presence in this action of victims of the former president of the Republic," asking: "In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?" *Id.* at 27a. The court thought not. As a "final consideration," the court echoed Judge Real's view that resolution of the interpleader suit would not harm the Republic because the New York statute of limitations would bar any effort to obtain the Arelma assets from Merrill Lynch, so that, "[r]ealistically, we cannot envisage a lawsuit in which the Republic will prevail." *Id.* at 28a. These considerations led the court to conclude

that the Republic is not an indispensable party to the interpleader action.[9]

6. The Republic sought rehearing, arguing that "moral weighing" is not the standard established by Rule 19(b). In response, the panel withdrew its opinion and substituted a new one. Pet. App. 1a–11a. The revised decision removed the reference to "moral weighing" and was restructured to address directly the criteria identified in Rule 19(b); however, it substantially incorporated the reasoning of the initial decision. It thus reaffirmed the holding that the Republic is not an indispensable party, and it awarded the Arelma assets to the Pimentel class.

Accepting that the Republic is a "necessary" party under Rule 19(a) (Pet. App. 5a), the Ninth Circuit began with the term "equity and good conscience," which is part of the Rule 19(b) test. The court opined that, "in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and 'good conscience' referred to an interior moral arbiter regarded as the voice of God." *Id.* at 6a. The court concluded that the terms more recently had been "domesticated," taking on "a secular rather than a religious cast," but nevertheless believed that their use in Rule 19 "emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions." *Ibid.*

The Ninth Circuit then turned to the considerations identified in the text of Rule 19(b) as relevant to the indispensability inquiry. Although the court

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[9] Several days later, the court of appeals issued a revised opinion that was amended in ways that are not material here. Pet. App. 12a–20a.

reiterated that sovereign immunity generally is a "powerful consideration," it found the Republic's immunity entitled to no weight in this case because, in its view, the Republic had no interest that it could enforce and "[t]o protect a party as indispensable, Rule 19 requires an interest that will be impaired by the litigation as a practical matter." Pet. App. 7a (citation and internal quotation marks omitted). The court believed that the Republic had no such interest because, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Ibid.* That is so, the court reasoned, because an action by the Republic to recover the assets held by Merrill Lynch in the United States would be barred by the New York statute of limitations governing suits for misappropriation of public funds. *Id.* at 8a. The court thought it immaterial that claims brought by the Republic in Philippine courts seeking recapture of assets stolen by Marcos are *not* subject to a statute of limitations, reasoning that "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect." *Ibid.*

For similar reasons, the Ninth Circuit found it irrelevant that the district court's judgment did not contain provisions designed to protect the Republic's interest; "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." Pet. App. 9a. The court also reasoned that a judgment for the Pimentel class issued in the Republic's absence would be "adequate" because "the symbolic significance of some tangible recovery [for the class] is not to be disre-

garded." *Ibid.* The court was not persuaded by the argument that Marcos's victims "should find redress from their own government" because, it believed, "the Republic has not taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." *Id.* at 9a–10a. The court also stated that the Pimentel class has "no forum within the Philippines open to their claims." *Id.* at 10a.

In holding that the Republic and the PCGG are not indispensable and affirming the judgment for the Pimentel class, the Ninth Circuit recognized that the Arelma "assets may be distributed after judgment here and be beyond recapture," so that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App. 8a–9a. But the court did not regard that as relevant because, as noted above, it believed that the Republic's legal claim to the assets ultimately would fail on statute of limitations grounds. Thus, the court concluded, "[n]o injustice is done if [the Republic] now loses what it can never effectually possess." *Id.* at 10a. The court added that "neither Arelma itself," which it characterized as a "shell corporation," "nor the Philippine National Bank as escrow holder now have an interest to be protected." *Ibid.*

The court of appeals subsequently denied a renewed petition for rehearing. In doing so, it reiterated its view that the Republic could not enforce a Philippine judgment awarding it the Arelma assets because "[t]he Republic has no jurisdiction over the *rem* [*sic*], which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States." Pet. App. 61a. The Ninth Circuit also restated its view that suit may

proceed under Rule 19(b) even in the absence of a necessary party that asserts sovereign immunity. The court recognized that "some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b)." But the Ninth Circuit explicitly rejected that approach, instead "follow[ing] the four-factor process even with immune [entities]." *Id.* at 61a–62a (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The Rule 19 issue was properly before the court of appeals and is properly before this Court. Wholly apart from the right of the Republic to appeal, PNB and Arelma had an unquestioned right to appeal and seek certiorari. When they did, the Ninth Circuit and this Court became obligated to apply Rule 19(b) so as "to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968).

Moreover, the Republic had the right to appeal the Rule 19 question on its own. The Republic was named a party to this litigation; while a party, it requested the relief it is seeking now on appeal and by certiorari; it was denied that relief by the district court, in a ruling that had the effect of substantially vitiating the Republic's sovereign immunity; and it suffered injury through denial of that relief, amounting to a final decision on its rights, that it is able to redress only by taking an appeal. In these circumstances, the appeal simply permits the Republic to continue pursuing the relief it requested prior to its technical dismissal from the suit.

II. On the merits, the case should be dismissed under Rule 19(b). The sovereign immunity of an absent party is a "substantive" factor that is "compelling" and requires dismissal of the action. *Provident*, 390 U.S. at 118–119. For the suit to proceed in the Republic's absence would override its immunity as a practical matter, effectively depriving the Republic of assets it claims under Philippine law and coercing it to participate in the litigation. Such an outcome cannot be reconciled with the immunity principle.

In addition, even apart from the question of immunity, the Ninth Circuit's analysis misapplied the equitable considerations that bear on indispensability under Rule 19. The judgment here substantially impaired the Republic's interest in the Arelma assets; the Ninth Circuit's belief that the Republic would not prevail if it brought suit to recover those assets is both legally immaterial and wrong on its own terms. That judgment could not possibly be structured to protect the Republic's interest. The judgment also is not "adequate" because it wholly discounts the Republic's claim and does not, even in the Ninth Circuit's own view, completely resolve the Arelma dispute. And there is no need for an alternative remedy here, both because resolution of the Pimentel class claim should occur *after* ownership of the Arelma assets is settled in the Philippines and because the unavailability of a forum is a consequence of the Republic's immunity.

Finally, an additional set of considerations also militates powerfully against adjudication of this action. Entry of judgment here would effectively preclude the Republic from recovering assets stolen by its former President, short-circuiting litigation now pending in the Philippine courts and interfering with

one of the Republic's essential interests. And continuation of this litigation also threatens to disrupt broader international cooperation in combating official corruption, causing friction in the United States' relationship with important allies.

ARGUMENT

I. The Rule 19 Question Was Properly Brought Before The Court Of Appeals And This Court.

Both in the interlocutory appeal to the Ninth Circuit and again in their appeals after the district court entered final judgment for the Pimentel class, the Republic, the PCGG, PNB, and Arelma each argued that this case should have been dismissed under Rule 19. The Ninth Circuit entertained and decided these appeals on the merits. After the Ninth Circuit ruled against these appellants in their second appeal, they sought review in this Court, which granted their joint petition for certiorari. Upon doing so, however, the Court instructed the parties to address the following questions:

> Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they are not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have the right to seek this Court's review of the court of appeals's opinion affirming the district court.

The Court need not resolve these questions because there is no doubt that *PNB and Arelma* had a right to appeal the case to the Ninth Circuit and to seek review in this Court, a course that permitted—indeed, obligated—the court of appeals and this Court to address the Rule 19(b) question. If the Court does reach the issue of appealability, though, it should hold that the Republic was entitled to preserve its essential rights by presenting the Rule 19 issue on appeal and by means of certiorari.

A. PNB and Arelma properly brought the Rule 19 question before the court of appeals and this Court.

Regardless of whether the Republic is a proper appellant or petitioner, the question of the Republic's status as an indispensable party to the interpleader proceeding was properly placed before the court of appeals and then this Court by PNB and Arelma. They were named as defendants in the amended complaint. JA 13, 15. As parties that indisputably were bound by the district court's final judgment, they plainly were entitled to—and did—appeal from that judgment and seek certiorari in this Court.

Once PNB and Arelma invoked the jurisdiction of the Ninth Circuit and of this Court, principles of equity placed the question whether Rule 19(b) requires dismissal of the action in the Republic's absence squarely before the court of appeals and this Court—and would have even if *no* party had raised the issue. Rule 19 serves three basic purposes: "to protect the absentee from prejudice, to protect those made parties from harassment by successive suits, and to protect the courts from being imposed upon by multiple litigation." 7 C. Wright *et al.*, *Federal Practice and Procedure* § 1609, at 142 (3d ed. 2001) [hereinafter

Federal Practice and Procedure]. "For the first of these purposes, timely objection of the parties is immaterial. If the absentee otherwise will suffer prejudice, the court *must act on its own initiative* to protect the absentee * * *." *Ibid.* (emphasis added); see also, *e.g.*, *Provident*, 390 U.S. at 111; *Minnesota* v. *N. Secs. Co.*, 184 U.S. 199, 235 (1902) (failure to join an indispensable party "may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel"); *Hoe* v. *Wilson*, 76 U.S. 501, 504 (1869); *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827).

The obligation to protect the rights of absent persons extends to appellate courts, as this Court has expressly held: "When necessary, * * * a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident*, 390 U.S. at 111. See 7 *Federal Practice and Procedure*, *supra*, § 1609, at 138–144. Thus, the appeal of PNB and Arelma obligated the court of appeals to consider whether the prospect of prejudice to the absent Republic required dismissal of the interpleader action pursuant to Rule 19(b). The grant of PNB's and Arelma's petition for certiorari properly places the issue before this Court as well.

Moreover, PNB and Arelma in fact *did* repeatedly raise the Rule 19(b) issue, in both the district court and the court of appeals. Under the Federal Rules of Civil Procedure and basic principles of equity, any party may raise the failure to join an indispensable party as grounds for dismissal of a case. See Fed. R. Civ. P. 12(b)(7); 7 *Federal Practice and Procedure*, *supra*, § 1609, at 139 ("[a]ny party may bring the issue to the court's attention"). A party

seeking dismissal may do so by asserting that either it or the absent party would be disadvantaged were the case to proceed to judgment without the participation of the absent party. See Advisory Committee Notes, 1966 Amendment to Rule 19 (observing that the moving party may be "seeking dismissal in order to protect himself against a later suit by the absent person" or may be "seeking vicariously to protect the absent person against a prejudicial judgment"). In this case, obtaining dismissal of the interpleader action was in PNB's interest as an escrow agent bound to dispose of Arelma assets only in accordance with a ruling of a Philippine court, and in Arelma's interest as the legal owner of the assets. See CA9 E.R. 150–155; note 7, *supra*. Accordingly, PNB and Arelma properly raised the issue of the Republic's indispensability in the district court, appealed the adverse determination of the district court to the court of appeals, and petitioned for review by this Court.

B. The Republic was entitled to appeal and seek review in this Court.

Although the involvement of PNB and Arelma make it unnecessary for the Court to address the questions it posed, the Republic also was entitled to appeal and to seek review in this Court.

1. This Court has "never * * * restricted the right to appeal to named parties to the litigation," and in any event "[t]he label 'party' does not include an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin* v. *Scardelletti*, 536 U.S. 1, 7, 10 (2002). See also *Karcher* v. *May*, 484 U.S. 72, 77 (1987) (noting, with reference to a prior version of 28 U.S.C. § 1254, "the general rule that one who is not a party or has not been *treated as*

a party to a judgment has no right to appeal therefrom") (emphasis added); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917) (declining to entertain appeal by a state that "was not at any time a party to this record" on the ground that no appeal can be taken by a person "who is not a party *or privy to the record*") (emphasis added). And the Court has recognized the importance of permitting appeal when a district court's decision "amounted to a 'final decision of [petitioner's] right or claim'" or when "appealing * * * is petitioner's only means of protecting himself." *Devlin*, 536 U.S. at 9, 10–11 (bracketed material added by the Court; citation omitted).

2. These principles control in a case like this one, where an entity that was a party is dismissed on grounds that deny it the full relief it requested from the district court. To be sure, the Republic's dismissal from the case on sovereign immunity grounds prior to its second appeal means that, in one technical sense, it may not have been a "party" to the action at the time the district court entered its final judgment. But "[l]ittle difficulty is encountered in rejecting spurious arguments that parties who have been 'dismissed' cease to be parties and cannot appeal." 15A *Federal Practice and Procedure*, *supra*, § 3902.1, at 102.

The Republic *was* a party that was named in the litigation at the outset. In that capacity, it sought two closely connected forms of relief in the district court—dismissal *of itself* on sovereign immunity grounds and dismissal *of the action* under Rule 19—both of which were essential to protect its rights and which are inextricably related in the context of an interpleader action. The district court denied both forms of relief and the Republic properly appealed

the denial of both to the Ninth Circuit. That court granted one form of relief (dismissal of the Republic on sovereign immunity grounds) but reserved judgment on the other, staying the action "as an alternative to [the Republic's] preferred remedy of dismissal of the entire interpleader action." Pet. App. 42a. On remand, the district court dissolved the stay and, after doing so, entered a final judgment on the merits that, all agree, severely prejudices the Republic's interests as a practical matter. At that point, the Republic appealed from the final judgment so as to raise, once again, the "reserved" issue of its indispensability under Rule 19(b).

The Republic thus (1) was a party; (2) while a party, requested the relief that is now the subject of this appeal and that is necessary to protect its interest; (3) was not only "privy to" (*Jack*, 244 U.S. at 402) but also largely responsible for the record in this case on the Rule 19(b) issue; and (4) was, and is, prejudiced by the denial of the requested relief. Against this background, two principal considerations establish the Republic's right to appeal.

First, the Republic asserted an interest—its entitlement not to have the litigation proceed—that has been finally decided by the district court and that will be irretrievably lost if the Republic cannot appeal. The two forms of relief initially sought by the Republic in the district court, dismissal of itself and of the action, were inextricably bound together in the context of an interpleader action. From the inception of this lawsuit, the Republic asserted that its absence from the litigation barred adjudication of *any* claims to the Arelma assets and required dismissal of the entire action. The district court's dismissal of the Republic as a party prior to resolving the Rule 19(b)

motion in no way diminished the Republic's interest in the court's eventual disposition of that issue. To the contrary, the peculiar nature of interpleader is such that, if such an action is allowed to continue after an immune sovereign is dismissed, the assertion of immunity actually *impairs* the sovereign's ability to protect its claimed interest in the disputed assets, leaving those assets to be awarded to or divided among the remaining claimants. See 7 *Federal Practice and Procedure*, *supra*, § 1705, at 556 ("[o]bviously, it is in the interest of each claimant to defeat or diminish the recovery of every other claimant").

Accordingly, the bare assertion (or grant) of immunity to the Republic could not serve to protect the Republic's interest. Instead, protection of its rights depended on successful assertion of the Republic's immunity *in conjunction with* a favorable disposition of its Rule 19(b) motion. Denial of the Rule 19 motion in this context, which allowed the interpleader action to go forward and the Arelma assets to be awarded to some other party, therefore "amounted to a 'final decision of [the Republic's] right or claim' sufficient to trigger [its] right to appeal." *Devlin*, 536 U.S. at 9 (citation omitted). That the district court dismissed the Republic from the suit prior to final disposition of the Rule 19(b) motion should not deny the Republic the opportunity to vindicate this essential right.

Second, an appeal from the district court's final judgment was the Republic's "only means of protecting [it]self" by seeking the relief it was denied below. Precluding an appeal "would deprive [the Republic] of the power to preserve [its] own interests." *Devlin*, 536 U.S. at 10, 11.

In its initial appeal to the court of appeals, the Republic pursued both dismissal of itself on sovereign immunity grounds and dismissal of the litigation on Rule 19 grounds. By appealing now, the Republic is simply continuing its pursuit of the relief that it requested prior to its dismissal from the action. In these circumstances, it would be perverse if the partial relief that the Republic did receive in its first appeal—dismissal of itself (but not of the whole suit) on sovereign immunity grounds—had the effect of precluding it from challenging on appeal the denial of the full relief it requested. Such an outcome would mean that the grant of sovereign immunity left the Republic *worse* off than if *both* forms of requested relief had been denied. Cf. *Minnesota* v. *United States*, 305 U.S. 382 (1939) (sovereign immunity prevented joining United States in case, but the United States nevertheless was able to challenge on appeal the denial of its motion to dismiss the action for failure to join an indispensable party).

3. This conclusion draws additional support from the "intensely 'practical' approach" the Court has taken to the right of appeal in other contexts. *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). For example, although 28 U.S.C. § 1291 limits appellate jurisdiction to "final judgments" of the district courts, this Court has long espoused a "practical rather than a technical construction" of this provision to preserve meaningful opportunity for appellate review. *Cohen*, 337 U.S. at 546. Because orders adjudicating rights collateral to the merits of an action may not be merged into the final judgment, the right to appeal those decisions would be "lost, probably irreparably," if appeal could be taken only upon entry of final judgment. *Ibid.*

Thus, "so as not to frustrate the right of appellate review," courts will entertain prejudgment appeals of collateral orders "when the practical effect of the order will be irreparable by any subsequent appeal." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). For reasons outlined above, the same outcome is appropriate here.

Similarly, the right to appeal from collateral orders extends both to parties and to affected nonparties. See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940); *U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *United States* v. *Nixon*, 418 U.S. 683, 691–692 (1974). The same regard for function over form also is reflected in the rule permitting appeals from the denial of third-party motions to intervene. *Bhd. of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947). Denying the opportunity to appeal on the ground that the sovereign had been dismissed from the action as a technical matter would amount to precisely the sort of "self-defeating judicial construction" that the Court has rejected in these other settings. *DiBella*, 369 U.S. at 126.

4. Finally, the Republic and the PCGG had the right to seek review in this Court. Under 28 U.S.C. § 1254(1), this Court may grant review by writ of certiorari "upon the petition of any party to any civil or criminal case." The term "party" is not defined. But if the Republic and the PCGG were entitled to appeal to the court of appeals, they surely were parties to that appellate proceeding in every ordinary sense: they were named in the caption of the case in the court of appeals, sought (and were denied) relief in that court, and will be bound by principles of estoppel that flow from the Ninth Circuit's judgment.

There is no statutory bar to their seeking review of that judgment in this Court.

II. In The Republic's Absence, This Case Should Be Dismissed Under Rule 19(b).

The framework for resolution of this case on the merits is set by Fed. R. Civ. P. 19. Under Rule 19(a)(2)(i), an entity must be joined to an action as a party—in common parlance, the entity is a "necessary" (or, in the formulation of the 2007 revision, a "required") party—if it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." As the Ninth Circuit itself recognized, the Republic plainly satisfies that test. Pet. App. 5a, 40a.[10]

The crux of the issue here is found at the next step of the inquiry, in Rule 19(b). That element of the Rule provides that, if an entity described in Rule

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[10] The court of appeals recognized that the Republic's claim to the Arelma assets is "substantial" (Pet. App. 40a) and that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. In fact, the Republic's claim to the assets is considerably more than "substantial": it is compelling. The judgment of the Philippine Supreme Court awarding Marcos' Swiss assets to the Republic demonstrates in considerable detail that Marcos stole those assets from the Republic (see *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 37–51), and the Swiss Federal Supreme Court likewise found that the illegal provenance of the assets is beyond reasonable dispute. See, *e.g.*, JA 74, 79. Indeed, it is notable that the Ninth Circuit did not suggest that there is any reason to believe that former President Marcos did not steal the Arelma assets or that they are not actually the property of the Republic under Philippine law.

19(a) cannot be made a party—which the Ninth Circuit again agreed is the case here, given the sovereign immunity of the Republic—"the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."[11] The Rule offers four non-exclusive factors that may be considered in guiding this decision: (1) "to what extent a judgment issued in the person's absence might be prejudicial to the person"; (2) the extent to which, by use of protective provisions in the judgment, "the prejudice can be lessened or avoided"; (3) "whether a judgment rendered in the person's absence will be adequate"; and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." In setting out this inquiry, Rule 19 "emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing." *Provident*, 390 U.S. at 116 n.12.

Under this regime, a party (in the language of the pre-revision Rule 19) is deemed "indispensable" once the court concludes that the case should not proceed in the party's absence. As Justice Harlan ex-

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[11] Thus, "[t]o use the familiar but confusing terminology" of the pre-2007 Rule 19, "the decision to proceed is a decision that the absent person is merely 'necessary,' while the decision to dismiss is a decision that he is 'indispensable.'" *Provident*, 390 U.S. at 118. To make this terminology even more confusing, although parties affected by and therefore required to be joined to the action were generally labeled "necessary" by courts and commentators prior to the 2007 revision, that word did not actually appear in the Rule. The revised Rule 19 uses the term "required party" to describe those that must be joined if possible (those formerly described by courts as "necessary") and eliminates the term "indispensable."

plained for a unanimous Court in the leading decision on Rule 19(b):

> [t]he decision whether to dismiss (*i.e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.

Provident, 390 U.S. at 118–119. For several reasons, the Ninth Circuit's application of these principles was fundamentally flawed.

A. A case must be dismissed under Rule 19(b) when a necessary party is unavailable because it has sovereign immunity.

1. Allowing suit to proceed when a necessary party asserts sovereign immunity is inconsistent with the policies of the immunity doctrine.

To begin with, the Ninth Circuit departed from principles regarded as fundamental by this Court when it failed to recognize that the sovereign immunity of a "necessary" party is one of those "substantive" factors that are "compelling by themselves" (*Provident*, 390 U.S. at 118–119) and that, without more, generally *require* dismissal of the action under Rule 19(b). Since Revolutionary times, it has been thought "'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its*

consent. This is the general sense and the general practice of mankind.'" *Fed. Maritime Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting *The Federalist*, No. 81, at 487–488 (C. Rossiter ed. 1961) (Hamilton) (emphasis in *The Federalist*)). So far as foreign sovereigns are concerned, that principle was recognized "very early in our history" and "has since become part of the fabric of our law" (*Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955)), established first by this Court as a matter of common law (see *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) and subsequently codified in the FSIA.

It has long been the position of the United States that immunity in domestic courts for foreign sovereigns serves interests of substantial public importance: "'the purpose of sovereign immunity in modern international law . . . is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts.'" *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (quoting testimony of State Department Legal Advisor)). Such immunity is provided as a "gesture of comity between the United States and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688–689 (2004); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486–487 (1983). Where it applies, immunity spares the sovereign's treasury, altogether protects it against the burden of having to engage in litigation, preserves important dignatory interests of the sovereign, and—in the international context—avoids what otherwise would be the source of considerable friction in the United States' foreign

relations. See, *e.g.*, *Fed. Maritime Comm'n*, 535 U.S. at 765–766; *Nat'l City Bank*, 348 U.S. at 362.

In this case, the court below purported to respect the Republic's sovereign immunity by dismissing it from the action. But the Ninth Circuit then proceeded to resolve the interpleader action on the merits and to award the Arelma assets to another claimant. Even if the Republic is not bound in a technical sense by that judgment, allowing litigation like this to proceed in the absence of a sovereign that claims immunity, when the sovereign is a "necessary" party under Rule 19(a), wholly vitiates the significance of its immunity. The Ninth Circuit itself acknowledged that the litigation here will accomplish precisely that result, recognizing that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App 9a. That outcome would make the Republic's assertion of immunity meaningless as a practical matter and wholly frustrate the compelling interests served by the immunity doctrine, the foremost of which is to ensure that a sovereign's interests are not adjudicated against its will. See, *e.g.*, *Enter. Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (suit adjudicating sovereign's interest in a contract in the sovereign's absence would "effectively abrogate * * * sovereign immunity"). And that real-world consequence of the judgment has special significance under Rule 19, where the decision whether to dismiss "must be made on the basis of practical considerations." *Provident*, 390 U.S. at 116 n.12.

Allowing such a judgment to issue would do more than award to private litigants assets that are claimed by a sovereign; it also would coerce the sovereign into formally surrendering its immunity and

appearing in court so that it is able to defend interests that otherwise would simply be overborne without its participation. This Court made just that point in very similar circumstances in *Federal Maritime Commission*, explaining that, when a proceeding will have the same practical effect as a judgment against a sovereign, the sovereign either "would effectively be required to defend [itself]" or would "substantially compromise its ability to defend itself at all." 535 U.S. at 762. To believe that this sort of choice does not "coerce" a sovereign into participating in litigation and waiving immunity, the Court concluded, "would be to blind ourselves to reality." *Id.* at 763–764.

Entertaining an action in the absence of a necessary party that has asserted sovereign immunity therefore is inconsistent with the immunity doctrine. In circumstances like those here, a judgment awarding assets claimed by a sovereign has the same effect on the sovereign's treasury as would a suit in which the sovereign is compelled to appear; as Judge Coffin wrote for the First Circuit, "[a] judgment for the [claimant] would necessarily be based on a holding that the [sovereign] had no right in the fund." *Am. Guaranty Corp.* v. *Burton*, 380 F.2d 789, 791 (1st Cir. 1967). And in the international context, awarding assets claimed by another nation to private parties, as the result of litigation in which that nation did not participate, destroys the "grace and comity" that underlies the immunity principle.[12] After all, "[i]t is

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[12] The proposed United Nations Convention on Jurisdictional Immunities of States and Their Property, which was opened for signature in 2005 (U.N. Doc. A/59/508), requires recognition of immunity when a state "is not named as a party to the proceeding but the proceeding seeks to affect the property, rights, in-

wholly at odds with the policy of [sovereign immunity] to put the [sovereign] to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

2. This and other courts have recognized that an action should not proceed when a necessary party whose interests will be affected by the litigation is immune from suit.

For just these reasons, this Court already has held that a sovereign is an "indispensable" party in a suit—like this one—that "is essentially one designed to reach money which the government owns." *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945) (citing *Minnesota* v. *United States*, 305 U.S. at 386). Such a suit must be dismissed when the sovereign claims immunity because "the government's liability cannot be tried 'behind its back.'" *Ibid.* See *California* v. *Arizona*, 440 U.S. 59 (1979); *Minnesota* v. *United States*, 305 U.S. at 383–384; 7 *Federal Practice and Procedure*, *supra*, § 1617, at 252–259 & n.10 (citing *Forrestal* and *Minnesota* for proposition that, "[w]hen an interest of the federal government is involved in a suit and a judgment cannot be rendered without affecting that interest * * * the United

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terests or activities of that * * * State." *Id.* Art. 6(2)(b). Although the United States has not signed the Convention, "it is the position of the United States that a number of [the Convention's] provisions * * * reflect current international norms and practices regarding foreign state immunity." Brief of the United States as *Amicus Curiae* in Support of Defendant-Appellant, *Belize Telecom, Ltd.* v. *Gov't of Belize*, No. 05-12641-CC (11th Cir. Oct. 6, 2005), http://www.state.gov/s/l/2005/87217.htm.

States may be regarded as an indispensable party under Rule 19 and the action dismissed").[13] See also 4 J. Moore *et al.*, *Moore's Federal Practice* § 19.05[2][c], at 19-91 (2006) [hereinafter *Moore's Federal Practice*] ("courts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee waiving an immunity to suit").

For the most part, the courts of appeals have faithfully applied this approach, holding that sovereign immunity, even if not wholly dispositive, is entitled to compelling weight in the Rule 19(b) calculus. These courts have recognized that, "when an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotation marks omitted). Accord *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48–49 (2d Cir. 2004); *Enter. Mgmt.*, 883 F.2d at 894; *Wichita & Affiliated Tribes*, 788 F.2d at 777. See also *Davis* v. *United States*, 343 F.3d 1282, 1293–1294 (10th Cir. 2003) (although balancing of the Rule 19(b) factors cannot be "completely avoided simply because an absent person is immune from suit," "the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit");

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[13] Although these decisions predated Rule 19(b), the governing joinder law at the time was substantially identical to that now stated in the Rule. See *Provident*, 390 U.S. at 116 n.12 ("The new text of the Rule was not intended as a change in principles.").

United States ex rel. Hall v. *Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) (same).

These holdings were compelled by the significance of the interests served by sovereign immunity. "The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [sovereigns] from suit without * * * consent.'" *Fluent*, 928 F.2d at 548 (quoting *Wichita & Affiliated Tribes*, 788 F.2d at 777). The Ninth Circuit's contrary conclusion "dismisses substantially the policy of [sovereign] immunity, which, after all, accords to * * * sovereignty and [the sovereign's] autonomy a place in the hierarchy of values over society's interest in making [the sovereign] amenable to suit." *Wichita & Affiliated Tribes*, 788 F.2d at 776. Cf. *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (cross-claim against sovereign prohibited because "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."). In this context, requiring dismissal of a suit to preserve a foreign nation's sovereign immunity is not at all inconsistent with Rule 19(b)'s standards of "equity and good conscience"; to the contrary, the foreign sovereign immunity doctrine *itself* "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank*,

348 U.S. at 362. The decision below cannot be squared with this understanding.[14]

3. The conclusion that the immune party's claim to the disputed assets would not prevail on the merits if litigated is not a proper basis for disregarding its sovereign immunity.

The Ninth Circuit acknowledged that, "[i]n the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action." Pet. App. 6a. Notwithstanding that recognition, however, the court proceeded to conclude that, "under Rule 19, [sovereign immunity] is *not* the sole consideration." *Id.* at 7a (emphasis added). For reasons we have explained, that conclusion was wrong. And the court of appeals greatly compounded its error in the remainder of its analysis: one of its principal bases for disregarding the Republic's immunity was its conclusion that the Republic's claim to the Arelma assets would fail *on the merits* if litigated. That reasoning endorsed an approach that effectively adjudicates a claim against the sovereign *in the sovereign's absence* as a means of determining whether

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[14] In its brief supporting the grant of certiorari (at 10–11), the United States did not contend "that an immune sovereign is automatically indispensable," pointing to cases where litigation was allowed to proceed because the interests of the absent sovereign were adequately protected by entities that did participate in the litigation or relief was structured to avoid prejudice to the absent sovereign. There is no need for the Court to consider such exceptions in this case. Here, the Ninth Circuit acknowledged that no other party to the litigation protected the interests of the Republic (see Pet. App. 40a; see also note 7, *supra*) and it is undisputed that relief cannot be tailored to avoid injury to the Republic.

the sovereign's absence from the suit requires dismissal.

This approach rests on a basic misunderstanding of sovereign immunity. The doctrine precludes a sovereign from being compelled to litigate its interest in disputed assets; it surely also precludes a court from *itself* assessing the strength of the sovereign's claim and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits. After all, resolving the Rule 19(b) inquiry by looking at the merits of the sovereign's case actually increases the pressure on the sovereign to appear in court and participate in the litigation, as the sovereign "obviously will not know *ex ante*" how the court will assess the strength of the sovereign's claim on the merits. *Fed. Maritime Comm'n*, 535 U.S. at 764 n.17.

The perverse effect of the Ninth Circuit's approach is reflected by what happened in this case: the only consequence of the Republic's invocation of its immunity was that it was not present to protect itself when the court purported to assess the merits of its claim to the Arelma assets. Needless to say, litigation about the merits of an absent party's claim, which will proceed without a full adversary presentation on the issues, may well come to the wrong conclusion. That happened here: as we explain in more detail below (at 39–41), the Ninth Circuit was incorrect in its belief that the Republic would be unable to obtain the Arelma assets. Moreover, permitting the case to proceed in the sovereign's absence denies the sovereign an opportunity to litigate other grounds on which dismissal might be appropriate. In this case, for example, there were powerful arguments that the suit should have been dismissed on

grounds of comity, act of state, or forum non conveniens, all of which were ignored by the courts below.[15] For this reason as well, a court's non-litigated assessment of the merits is not an adequate substitute for dismissal of the action on the basis of sovereign immunity. The Ninth Circuit's contrary conclusion should be set aside.

B. Even apart from the Republic's immunity, this suit should be dismissed under Rule 19(b).

Wholly apart from its misunderstanding of the relationship between sovereign immunity and Rule 19(b), the holding below also misconstrued the equitable factors specified in the Rule as bearing on indispensability. When considering those factors, "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party"; rather, whether dismissal of the suit is required "can only be determined in the context of particular litigation." *Provident*, 390 U.S. at 118 n.14 (citation omitted). Assuming that a balancing of the Rule 19(b) factors could be appropriate in this case notwithstanding the Republic's immunity, there should be no doubt about the outcome: Every relevant consideration points strongly in favor of dismissal.

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[15] The Republic and the PCGG raised each of those grounds in the district court and noted them in their briefing to the Ninth Circuit. Republic CA9 Br. 44–46. As non-participants in the underlying action following the Ninth Circuit's recognition of their immunity in the original appeal, however, they did not have an opportunity to address the issues in any detail.

1. Further litigation is improper because it will impair the interests of absent parties.

The first factor identified in Rule 19(b) indicates that "the court must consider the extent to which the judgment may 'as a practical matter impair or impede [the absent party's] ability to protect' his interest in the subject matter." *Provident*, 390 U.S. at 110 (quoting Rule 19(a)); see also Rule 19(b) ("extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties"). There is no doubt that the Republic's interest in the Arelma assets was substantially (indeed, entirely) impaired by the interpleader proceeding, and the Ninth Circuit did not suggest otherwise. It hardly could have; "conflicting claims * * * to a common [fund] present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Wichita & Affiliated Tribes*, 788 F.2d at 774. See 4 *Moore's Federal Practice*, *supra*, § 19.05[2][d], at 19-23 (where there are inconsistent claims to the same assets, "prejudice from nonjoinder is virtually inescapable"). As Judge Learned Hand put it for the Second Circuit, in a decision that was cited by the drafters of Rule 19, such a suit "may not be so brought, unless justice to the absent parties can be done, and we cannot see how this may be assured." *Roos* v. *Tex. Co.*, 23 F.2d 171, 173 (2d Cir. 1927).

The Ninth Circuit nevertheless held that this consideration did not favor dismissal because, it believed, the Republic's claim to the assets could not prevail on the merits if it were litigated. Pet. App. 8a–9a. But that reasoning cannot justify the holding below, for several reasons.

First, consideration of the strength or merits of the absent party's claim generally has no place in the Rule 19(b) analysis. As other courts of appeals—including the Ninth Circuit in prior decisions—have recognized, the approach taken by the Ninth Circuit here

> amounts to asking us to decide that the [absent party's] "interest" is not worthy of consideration because its position is wrong on the merits. But Rule 19's concern is with a "*claimed* interest." * * * [T]he underlying merits of the litigation are irrelevant to a Rule 19 inquiry, at least unless the claimed interest is patently frivolous.

Davis, 343 F.3d at 1291 (quoting Rule 19; other citations and internal quotation marks omitted; emphasis in original). Accord *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest") (emphasis in original); *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993) (applying *Shermoen*); *Tankersley* v. *Albright*, 514 F.2d 956, 965–966 (7th Cir. 1975) (noting that "the necessity or indispensability of absent persons [must be] determined prior to any consideration of the merits of a case").[16] The reason is obvious: consideration of the

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[16] Courts likewise have held consideration of the merits impermissible in the closely related context of fraudulent joinder. See, *e.g.*, *In re Briscoe*, 448 F.3d 201, 218 (3d Cir. 2006) ("it was impermissible for the district court to reach the merits of that defense in deciding the fraudulent joinder question"); *Smallwood* v. *Ill. Cent. R.R. Co.*, 352 F.3d 220, 223 n.8 (5th Cir. 2003) ("the fraudulent joinder inquiry is a summary inquiry conducted in order to determine whether the court has jurisdic-

merits would involve distracting and time-consuming collateral litigation in every case implicating Rule 19(b), requiring a court to effectively settle the rights of an absent party—and to do so in circumstances where that party is not present to defend its interests. And for reasons already noted, such an inquiry is especially inappropriate when exploring the merits would require the court to disregard the absent party's sovereign immunity.[17]

Second, even if the merits could somehow be viewed as relevant, the Ninth Circuit was wrong in its view that the Republic would be unable to obtain the Arelma funds. The court opined that the Republic had "no practical likelihood of obtaining the Arelma assets" because a suit brought by the Republic against Merrill Lynch would be barred by New York's six-year statute of limitations for misappropriation of public funds. Pet. App. 10a, 8a–9a. But Merrill Lynch had indicated that it would surrender the assets in accord with the ruling of the Sandigan-

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tion over the matter. A court may thus not use fraudulent joinder as an excuse to pre-try the merits of the case").

[17] Citing *Provident*, the United States suggested in its brief supporting certiorari (at 11) that "the Court has not ruled out consideration of the underlying merits of a claim in the course of determining the extent of prejudice to an absent party." But *Provident* did not endorse consideration of the merits in a situation like the one here. Addressing the argument that there was virtually no chance of recovery *against* the absent party in *Provident*, and that dismissal accordingly was not warranted to protect that party, the Court briefly adverted to the possibility of "explor[ing]" this point. 390 U.S. at 115. But the Court did not indicate that it ever would be appropriate to consider the merits of a substantial claim to disputed assets asserted *by* an absent party in deciding whether suit should proceed in the party's absence. Moreover, the separate concerns implicated by sovereign immunity were not at issue in *Provident*.

bayan, which currently is adjudicating ownership of the Arelma assets. See note 5, *supra*. That court has authority under Philippine law to determine ownership of assets misappropriated by public officers and is not subject to a statute of limitations. See pages 4–6, 12, *supra*. As a consequence, had it not been for this litigation, there is every reason to believe that Merrill Lynch would have transferred the Arelma assets to the Philippines in response to a favorable ruling of the Sandiganbayan, and no reason to believe that a suit subject to the New York statute of limitations ever would have been brought.

Moreover, in the event that the Republic were forced to bring an action against Merrill Lynch to obtain the Arelma assets, the New York statute of limitations still would not be an obstacle. Such a suit would involve an attempt to enforce the judgment of the Sandiganbayan and would be premised on the *new* breach of contract reflected in refusal to transfer the funds in response to the Republic's (or PNB's or Arelma's) request, and therefore would not be affected at all by the New York statute of limitations governing misappropriation cases. Nor is there reason to doubt that the judgment of the Sandiganbayan would be enforced by a U.S. court in such a suit. As a general matter, courts in the United States (with limited exceptions not relevant here) presume that foreign courts had jurisdiction to issue their judgments. See *Restatement (Third) of Foreign Relations Law* § 482 cmts. a, d (1987); C. Chao & C. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 157 & nn.64–66 (2001). In any event, the Sandiganbayan's authority to determine ownership of the Arelma shares, which are located in the Philippines, is undisputed, and control of

Arelma's funds should follow the shares. And even if it were necessary that the Sandiganbayan judgment direct forfeiture of Arelma funds located in this country, such a judgment could be enforceable under U.S. law or treaties to which the United States is a party.[18] The Ninth Circuit's belief that the Republic "has no practical likelihood of obtaining the Arelma assets" therefore was deeply misinformed.

Third, the danger of prejudice to an absent party, and the difficulties caused by proceeding with litigation when a principal defendant cannot be joined, are especially acute in an interpleader proceeding like the one here. This case presents "the classic situation envisioned by the sponsors of interpleader," in which "a stakeholder" is "faced with rival claims to the fund itself." *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 534 & n.16 (1967). In such circumstances, the purpose of interpleader is "broadly to remedy the problem posed by multiple claimants to a single fund," addressing the danger that the "first claimant might appropriate all or a disproportionate share of the fund"; the "difficulties such a race to judgment pose for the [stakeholder], and the unfairness which may result to some claimants, were among the prin-

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[18] See 28 U.S.C. § 2467(c)(1)(b) ("the United States may file an application on behalf of foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States"); Treaty on Mutual Legal Assistance on Criminal Matters (MLAT), Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1996); United Nations Convention Against Corruption (Convention Against Corruption), G.A. Res. 4 (LVII), U.N. Doc. A/RES/58/4, at 22, 32 (2003).

cipal evils the interpleader device was intended to remedy." *Id.* at 530, 533 (footnote omitted).

Allowing such a proceeding to go forward in the absence of a principal claimant, however, turns these policies upside down. It either assures unfairness, with the fund sought by the absent claimant awarded to someone else in that claimant's absence, or subjects the stakeholder to vexatious and multiple litigation as the absent claimant seeks to recover from the stakeholder after the funds have been paid to someone else. In either case, such litigation will (in the language of Rule 19(b)) "be prejudicial to the [absent] person or those already parties" and should not proceed to judgment. That is why the Ninth Circuit recognized, at an earlier stage of this case, that "[w]ithout all significant claimants in an interpleader action, its purpose is materially frustrated"—and that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence." Pet. App. 41a. The doubt that the Ninth Circuit expressed at that time surely was well-grounded.

2. The judgment could not be structured to protect the interests of absent parties.

The second Rule 19(b) consideration directs the court to ask whether the judgment can "'be written so as to protect the legitimate interests of outsiders.'" *Provident*, 390 U.S. at 112 n.10 (quoting Advisory Committee Notes, 1966 Amendment to Rule 19). That plainly is impossible in a case like this, where all parties are claiming 100 percent of the same funds. See, *e.g.*, *Hall*, 100 F.3d at 480 (where all claim the same assets, there is "no way that [the court] might shape relief to lessen the potential

prejudice to the [absent party]"). Again, the Ninth Circuit disregarded this consideration on the theory that, "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." Pet. App. 9a. But that analysis is just as wrong here as it is in relation to the first Rule 19(b) factor. As the Tenth Circuit has explained, the sort of approach taken by the Ninth Circuit here is improper because "this argument goes to the merits of [the absent party's] claim, rather than the potential harm to the [absent party]" that would be caused by an unfavorable judgment. *Davis*, 343 F.3d at 1292. And in any event, as we have explained, there is every reason to believe that the Republic *would* be able to recover the Arelma assets.

3. The judgment here is not "adequate" because it does not result in the complete and efficient settlement of the controversy.

As for the third Rule 19(b) factor, the Ninth Circuit found the judgment here "adequate" because, although the Arelma assets would not satisfy the Pimentel class's entire $2 billion judgment against the Marcos estate, "the symbolic significance of some tangible recovery is not to be disregarded" and pro rata distribution of the assets to the class "will have monetary meaning for the poor among them." Pet. App. 9a. But this reasoning misunderstands the Rule 19(b) "adequacy" consideration. The Rule is not concerned with whether the judgment adequately compensates the plaintiffs, as the Ninth Circuit believed. Instead, this Court has understood this consideration to take account of "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," "read[ing] the Rule's third criterion, whether the judgment issued in the ab-

sence of the nonjoined party will be 'adequate,' to refer to th[e] public stake in settling disputes by wholes, whenever possible." *Provident*, 390 U.S. at 111. See 7 *Federal Practice and Procedure*, *supra*, § 1608, at 114.

Other courts of appeals have followed that guidance, looking to whether judgment in the action will dispose of *all* interests in the dispute. As the Tenth Circuit put it, "[t]he Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view. * * * Rather, the factor is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1292–1293. Accord *Gonzalez* v. *Cruz*, 926 F.2d 1, 6 (1st Cir. 1991); *Hoheb* v. *Muriel*, 753 F.2d 24, 27 (3d Cir. 1985); *Haas* v. *Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 399 (5th Cir. 1971).

The judgment in this case cannot satisfy the standard articulated in *Provident*. The resolution here is hardly "adequate," as it wholly discounts the interest of the Republic. And it does not satisfy "th[e] public stake in settling disputes by wholes." *Provident*, 390 U.S. at 111. As the Ninth Circuit itself acknowledged, the Republic is not bound by the judgment and (at least as a matter of theory) is free to initiate further litigation—against either the Pimentel class or Merrill Lynch—to seek recovery of the Arelma assets. Pet. App. 8a. If that really is so, then "Merrill Lynch risks being sued again" by claimants to the assets who did not participate in the litigation. Pet. App. 10a. The judgment here therefore frustrates "all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the inter-

est of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation." *Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 737–738 (1977). Just as the outcome here will "materially frustrate[]" the goals of interpleader (Pet. App. 41a), it will undermine the objectives of Rule 19.

As further support for its application of the Rule 19 adequacy consideration, the Ninth Circuit also complained that "the Republic has not taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." Pet. App. 9a–10a. But it is extraordinary—and plainly improper—for a U.S. court to rule against a foreign state because the court takes issue with the legitimate, democratically implemented policy of that state. For the same reason that individual states of the United States may not conduct their own foreign policies (see *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 418–420 (2003)), it surely is inconsistent with the interests of the United States for federal courts to base rulings on their subjective dislike for the actions of foreign governments. The success of a U.S. judgment in undermining the actions of an allied nation can hardly be thought to establish its "adequacy" under Rule 19(b).

4. Dismissal is proper even if there is no alternative forum in which the Pimentel class may assert its current claims.

The fourth specified Rule 19(b) factor, which looks to the availability of an alternative remedy if this action is dismissed, points the same way. To be-

gin with, this consideration simply cannot count in favor of the Pimentel plaintiffs. The Republic and the Marcos estate are now contesting ownership of the Arelma assets before the Sandiganbayan. The Pimentel class asserts its claim to those assets only as a creditor of the estate. And a judgment creditor may enforce its rights only against the debtor's assets. Questions regarding availability of a remedy for the class therefore should not arise until *after* resolution of the ongoing Philippine litigation, which will determine whether the Arelma assets *are* a part of the Marcos estate.

In any event, even if the availability of an alternative forum were relevant, the absence of such a forum "is less troublesome in this case than in some others" because "[t]he dismissal of this suit is mandated by the policy of [sovereign] immunity." *Wichita & Affiliated Tribes*, 788 F.2d at 777. See *Davis*, 343 F.3d at 1293–1294; *Seneca Nation*, 383 F.3d at 48; *Hall*, 100 F.3d at 480–481. Indeed, the Ninth Circuit itself has repeatedly acknowledged that the lack of an alternative remedy is of limited significance when the absent party is immune from suit. *Wilbur* v. *Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005); *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002); *Davandewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002). There is nothing anomalous in such an outcome. As the Ninth Circuit has elsewhere recognized, dismissal of a suit is a "common consequence of sovereign immunity" (*Am. Greyhound Racing*, 305 F.3d at 1025); absent a waiver, claims against a sovereign will be dismissed despite there being no alternative forum in which they may be advanced—even if those claims are plainly meritorious. See, *e.g.*, *Verlinden*, 461 U.S. at 497.

It may be added that there *is* a forum open to assure judicial determination of ownership of the Arelma assets. That forum is the Sandiganbayan, which is determining whether the assets are the property of the Republic or of the Marcos estate. A ruling for the Republic would settle that the assets belong to the Philippines, while a contrary outcome would make them available for recovery by the Pimentel class as part of the *Hilao* judgment against the estate. Accordingly, if the Pimentel class truly is entitled to the Arelma assets, it will have an opportunity to obtain them.

5. *The imperative that a dispute over ownership of assets stolen by a former President of the Republic be settled in a Philippine court, and the adverse impact of this litigation on international anti-corruption efforts, are additional "compelling substantive interests" that require dismissal of this suit.*

Finally, additional considerations also militate in favor of dismissal of this action. The four factors listed in Rule 19(b) are nonexclusive and, according to the 1966 Advisory Committee, "are not intended to exclude other considerations which may be applicable in particular situations." Accord 7 *Federal Practice and Procedure*, *supra*, § 1607, at 88 (four listed factors "are not mutually exclusive, nor are they the only considerations that may be taken into account by the court in a particular case."); B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, pt. 1, 81 HARV. L. REV. 356, 365 (1967) (list in the Rule is "nonexhaustive"). Such "other considerations" are at play here: the holding of the court of appeals dis-

counts the importance to the Republic of having the ownership of assets stolen from the Philippine people by its former President settled by *its* courts, embraces an approach that will cause friction in the United States' relations with other countries, and threatens to interfere with important international efforts to enforce criminal and civil laws combating official corruption. These each present "compelling substantive interests" (*Provident*, 390 U.S. at 118–119) that warrant dismissal.

a. As a general matter, there is no doubt that United States judicial decisions impinging on the interests of other nations raise matters of the greatest political sensitivity and importance. See, *e.g.*, *Verlinden*, 461 U.S. at 489. Judicial "seizure of the property of a friendly state," for example—an action that is closely analogous to the proceeding here, in which United States courts propose to distribute to third parties assets claimed by the Republic—"may be regarded as * * * an affront to [that state's] dignity and may * * * affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35–36 (1945). The FSIA was directed at just these sorts of concerns. See, *e.g.*, H.R. REP. NO. 94-1487, at 27 (1976) (attachment of foreign government assets "can give rise to serious friction in the United States' foreign relations" and cause "significant irritation to many foreign governments").

This case graphically illustrates the problems that may arise when United States courts adjudicate the interests of foreign sovereigns without their consent. The dispute here concerns the ownership of assets claimed by the Republic that were stolen in the Philippines by its former President, a matter of the greatest importance and sensitivity to that Nation.

Paramount national policy of the Republic makes recovery of those assets a matter of the greatest urgency.[19] The Republic has sought to settle ownership of the Arelma assets through the Philippine court established for that purpose, litigating for more than fifteen years against the former President's estate and recovering large sums of money from it. Moreover, the competing claimants to the Arelma assets in the Ninth Circuit proceeding are virtually all citizens of the Philippines, which also makes *this* dispute one between the Republic and its citizens.

Against this background, the interference with the sovereign interests of the Philippines that is worked by the Ninth Circuit's judgment, as well as the likelihood that the judgment will cause significant friction in the United States' relationship with the Republic, is obvious. The Ninth Circuit interjected itself into a dispute between the Republic and its former President, over the ownership of assets stolen from the Republic during that President's tenure in office, and that also involves claims made by Philippine citizens arising out of injuries they suffered in the Philippines at the hands of the former

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[19] See, *e.g.*, Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) ("vast resources of the government have been amassed by former President Ferdinand E. Marcos" and "there is an urgent need to recover all ill-gotten wealth"); Phil. Exec. Order No. 14 (May 7, 1986) (Pres. Corazon Aquino) ("the vital task of [the PCGG] involves the just and expeditious recovery of * * * ill-gotten wealth in order that the funds, assets, and other properties may be used to hasten national economic recovery"). Philippine legislation provides that recovered assets must be dedicated to advancing the public good through agrarian reform that was neglected during the Marcos era. Comprehensive Agrarian Reform Law of 1988, Philippine Republic Act No. 6657 (1988).

President. As a practical matter, the decision below frustrates Philippine policy regarding the recovery of misappropriated state assets. And it effectively pretermits ongoing litigation in the Philippine courts between the Republic and the estate of its former President. It is difficult to imagine a case in which the Republic could have a more profound interest in resolution of the matter by its own courts. This surely is the sort of "pragmatic consideration" that is entitled to substantial weight under Rule 19(b). *Provident*, 390 U.S. at 116 n.12.

b. In addition, a related reason to favor dismissal of this suit is the impact of this litigation on the broader system of international efforts to combat official corruption. A central principle of that system is that misappropriated assets should be returned to the country of origin. That policy is stressed in the Convention Against Corruption, to which both the United States and the Philippines are States Parties, which makes the "return of [stolen] assets * * * a fundamental principle" (Art. 51) and obligates a State Party to the Convention to "[t]ake such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party." Art. 54(1)(a).[20] Compliance with the Convention in general, and with this repatriation-of-assets principle in particular, is an important element of the United States' International Transparency and Anti-Corruption Agenda, which strives to "ensure respon-

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[20] A similar principle is recognized in the MLAT, which provides in Article 16.2 that the contacting parties "shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses."

sible repatriation and use of the ill-gotten funds." Statement of the U.S. Delegation, Fifth Global Forum on Fighting Corruption & Safeguarding Integrity, Sandton Convention Centre, Johannesburg, South Africa, April 3, 2007, available at http://www.state.gov/p/inl/rls/other/82588.htm.

Indeed, it was application of this principle that led the Swiss Federal Supreme Court to return Marcos-related assets (including the Arelma shares) to the Philippines once it became clear that "[t]oday's state of knowledge does not allow serious doubts about the illegal provenance of the seized monies." *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997, at 211. The court explained that "[t]he decision whether to seize or restitute the monies seized must be taken in the Philippines where the criminal actions were committed." *Ibid.* (emphasis added).[21] Specifically rejecting claims to the Marcos assets asserted in the Swiss proceedings by the Pimentel class (see JA 84-87), the Swiss court noted that, although those injured by the Marcos regime "are entitled to compensation and a fair trial in which they can enforce their claims for compensation," it "is not possible to derive a right to attach the assets blocked in Switzerland for *previous* compensation. Therefore, the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its

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[21] See also JA 85; *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997; *In re Aguamina Corp.*, No. 1A.31, 41/1998.

organs." *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997, at 214 (emphasis in original). The existence of the Pimentel claims "does not create the inference that [they] have priority" over the Republic. JA 85.[22]

Thus, the Ninth Circuit's decision departs from and threatens to undermine the cooperative international system encouraging the repatriation of stolen assets that has been encouraged by the United States. In striking the balance under Rule 19(b), that consideration, too, is a "compelling substantive interest[]" that counsels in favor of dismissal of this action.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[22] For this reason, Switzerland submitted a diplomatic note to the State Department urging the United States to support the Republic's efforts to obtain reversal of the Ninth Circuit's decision. The note emphasized that "[r]eturning illicit assets to their country of origin through close international cooperation constitutes an important pillar of Swiss policy toward combating the inflow of illegal funds. Accordingly, Switzerland has cooperated closely and successfully with the Philippines on the return of the assets of Ferdinand Marcos. Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations under the Marcos regime." Pet. Cert. Reply Br. App. 1a. Switzerland added that "[t]he rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the [United Nations Convention on Corruption] and by Switzerland's own prior actions in assisting the Philippines." *Id.* at 2a.

Respectfully submitted.

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ADDENDUM

FEDERAL RULE OF CIVIL PROCEDURE 19

Effective December 1, 2007

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined,

the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

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In The
Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have a right to seek this Court's review of the court of appeal's opinion affirming the district court.

Whether the lower courts acted within their discretion and followed the tests set out in Rule 19(b) of the Federal Rules of Civil Procedure, as applied in *Provident Tradesmens Bank & Trust Co. v. Patterson*, in concluding, in equity and good conscience, that the Republic of the Philippines and its PCGG were not indispensable parties to this interpleader litigation.

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BRIEF FOR RESPONDENT MARIANO J. PIMENTEL

INTRODUCTION

This appeal presents the policy question of whether a foreign sovereign can upset a judgment rendered by a United States court adjudicating entitlement to assets long located in the United States based on the dual claims of immunity and indispensability. The prevailing party is a Class of indigent Filipino Human Rights Victims whose own government seeks to deprive them of compensation for their mistreatment by using its immunity as both a sword and a shield. Tradition and precedent of this Court support resisting manipulation of federal court procedures by the foreign sovereign.

COUNTER-STATEMENT OF THE CASE

The judgment in this statutory interpleader action awarded assets of about $35 million in an account (the "Account") at Merrill Lynch, Pierce, Fenner & Smith, Inc. to the Respondent Class of 9,539 victims of grave human rights abuses suffered during the 1972-86 martial-law regime of Ferdinand E. Marcos in the Philippines. Marcos was sued by the Class in the U.S. District Court for the District of Hawaii after he fled to Honolulu following the February 1986 "People Power" revolution in the Philippines.

In the interpleader, the Class members sought to collect a portion of their judgment of almost $2 billion

rendered in their historic human rights action. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996). The Class members are individuals (and their heirs) who were victims of "massive *jus cogens* human rights abuses for which Marcos was responsible." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.*, No. CV00-595-R (D.Hawaii Aug. 14, 2003) [hereinafter "Tr.Ct.Op."], Pet.App. 43a, 53a. They were "subjected to hideous tortures," "summarily executed" or "simply 'disappeared.'" *Id.* at 45a; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462-63 (D.Hawaii 1995) (listing specific forms of torture used).

The underlying case for massive human rights abuses was pursued with the explicit approval of the Republic,[1] which filed an *amicus curiae* brief in 1987 urging the U.S. courts to provide a venue for the Victims' claims. This *amicus* brief, discussed in more detail *infra*, stated explicitly that the Republic's "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *Amicus Curiae* Brief Filed in 1987 by the Republic in *Hilao v. Marcos*, No. 15039, RA-1, 11.

The Republic was also litigating actively in the United States during this period, seeking to recover

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[1] Reference to the Republic herein also refers to its executive agency, the Petitioner Presidential Commission for Good Government (PCGG).

Marcos assets, and it stated in a complaint it filed in the U.S. District Court for the Southern District of New York in 1986 that after Ferdinand Marcos became "the dictator of the Philippines with personal control over its government and economy," he "participated in a variety of activities constituting a gross denial of human rights, including abduction, murder, torture, summary incarceration and execution." *Republic of the Philippines v. Marcos*, 806 F.2d 344, 348 (2d Cir. 1986) (summarizing language from the Republic's complaint). The trial court explained in the present case that Marcos directly controlled all military and para-military groups in the Philippines and guided the systematic abuses imposed upon thousands of victims. Tr.Ct.Op., Pet.App. 44a-45a.

> The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. *They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead.*

Id. at 48a (emphasis added).

Merrill Lynch filed this interpleader action in September 2000[2] to determine the entitlement to Merrill Lynch securities account No. 165-07312 (the "Account") established by Ferdinand E. Marcos in 1972 in the name of Arelma Inc. a shell corporation[3] incorporated in Panama for the purpose of hiding actual ownership of these assets. *See* Tr.Ct.Op., Pet.App. 46a-47a. Arelma's incorporation coincided with Marcos's declaration of martial law and the onslaught of massive *jus cogens* human rights violations. *See id.* at 45a, 53a. The Arelma Account was opened with a deposit of $2,000,000 provided by Marcos, which grew to about $35,000,000 when the interpleader was filed in September 2000. *Id.* at 45a-46a; Ex. 9, Joint Appendix (JA) at 34. Merrill Lynch deposited the Account assets, consisting of securities and cash, in the district court at the outset of this statutory interpleader litigation. Tr.Ct.Op., Pet.App. 46a. Merrill Lynch named as defendants those

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[2] The Petitioners' assertion, Pet.Br. at 6 n. 5, that the lower court instructed Merrill Lynch to deposit the Arelma assets in the U.S. District Court for the District of Hawaii is contrary to fact and court ruling. A different federal judge in Hawaii, ruling on the Republic's recusal motion, found "the court did not direct, order, or require Merrill Lynch to file the instant action." Merrill Lynch has explained in its *amicus curiae* brief that it filed the interpleader action in the U.S. District Court for the District of Hawaii in September 2000, because of the competing claims that had been presented for the Arelma assets. Merrill Lynch Br. at 8.

[3] Petitioners acknowledge that Arelma was a "shell corporation" at page 2 of their Brief, and the court of appeals so found. Ct.Ap.Op., Pet.App. 10a.

persons or entities that had claimed the Account, including the four Petitioners, the Class of Human Rights Victims, and members of the Marcos family. JA13-15.

The record in this case, developed through four years of protracted and contentious litigation, contains undisputed evidence that the Arelma Account was established at the explicit direction of Marcos with funds he provided. "Arelma was incorporated to receive funds owned by Ferdinand Marcos," Tr.Ct.Op., Pet.App. 48a; "[t]he source of those funds [in the Merrill Lynch Account] was Ferdinand E. Marcos" *id.* at 45a; "[Ferdinand E.] Marcos controlled Arelma during his lifetime." *Id.* at 48a. "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." *Id.* at 53a.

The Republic has acknowledged that it knew about the Arelma Account since at least 1986. Pet.Br. at 5; *see also Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc.*, No. CV00-595MLR, Findings of Fact & Conclusions of Law re Rule 19(b) Motion (D.Hawaii Aug. 14, 2003) [hereafter cited as "Tr.Ct. FOF/COL"], Pet.App. 56a ("The Republic has been aware of the deposit since 1986 . . . "). In 1987, the Republic sought and obtained the assistance of the U.S. District Court for the Southern District of New York to issue a preliminary injunction freezing the Arelma account. *See* Ex. 23, JA35; Tr.Ct.Op., Pet.App. 47a; Tr.Ct.

FOF/COL, Pet.App. 56a. *See also Republic of the Philippines v. Marcos*, No. 86-2294 (S.D.N.Y. 1986). The Republic, however, never pursued recovery of the Arelma account, and the injunction lapsed.

Beginning in 1986, the Republic filed or was a party in at least a dozen cases in various U.S. courts seeking to recover Marcos assets, *see, e.g., Republic of the Philippines v. Marcos*, 818 F.2d 1473, 1475 (9th Cir. 1987), but never asserted immunity in any of these earlier cases. *See, e.g.*, Tr.Ct.Op., Pet.App. 47a; Tr.Ct. FOF/COL, Pet.App. 58a. Four cases were in the Hawaii federal court. Some of these cases were massive in scope and required federal courts to devote considerable judicial resources. The Republic participated in at least two other interpleader proceedings without asserting immunity or indispensability. *See Sotheby's v. Garcia*, 802 F. Supp. 1058 (S.D.N.Y. 1992) (in which the Republic waived its immunity and participated willingly in an interpleader concerning disputed paintings); *Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998) (involving a Picasso painting and including the Class as a claimant).

No evidence produced through discovery or introduced at the present interpleader trial by the Republic or its affiliated parties (Arelma and the Philippine National Bank ("PNB")) supports the Republic's position that the $2 million deposited in the Account was "misappropriated" or "stolen," which is the cornerstone of Petitioners' contentions. *See* Pet.Br. at 1. In fact, both lower courts concluded that

this Account was the property of Ferdinand E. Marcos: "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." Tr.Ct.Op., Pet.App. 53a. "Arelma is a shell corporation . . . and the court may look through the corporate form to *Marcos, the owner of its assets*." Ct.Ap.Op., Pet.App. 10a (emphasis added).[4] Although the Republic did not participate directly in the interpleader proceedings after it withdrew from the litigation, it utilized Arelma and PNB as its proxies because (a) after 2000, it controlled Petitioner Arelma, worked with Arelma's counsel, paid for Arelma's prosecution of the litigation, and (b) it controlled the escrow agent Petitioner PNB, owned 16% of PNB's stock, and elected four of its 11 directors. *See* Rogel Zenarosa Dep. at 9-12.

The Republic moved to dismiss itself on sovereign immunity grounds in this litigation only after losing a motion to change venue or recuse the judge assigned to the case. *See* Dkt. No. 56. At no time did the Republic seek to intervene for any purpose before the district court or the court of appeals, even after the district court ruled that it was not an indispensable party. Tr.Ct. FOF/COL, Pet.App. 55a-60a. The court of appeals ruled in 2002, in an earlier appeal,

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[4] The assertion made by Petitioners to the contrary in the last sentence of their footnote 10 (Pet.Br. at 25) is seriously misleading.

In re Republic of the Philippines, 309 F.3d 1143 (9th Cir. 2002), Pet.App. 30a-42a [hereafter cited as "2002 Ct.Ap.Op."] that the Republic was entitled to dismissal on sovereign immunity grounds, but it declined to accept the Republic's argument that it was an indispensable party to this litigation pursuant to Rule 19(b). *Id.* at 1153. On remand, in 2003, the district court, acting on the Rule 19(b) motion of Arelma and PNB, made detailed findings and conclusions holding the Republic was not an indispensable party. Tr.Ct. FOF/COL, Pet.App. 58a-60a. This opinion noted that the record was substantially more complete as a result of the completion of discovery and the filing of various motions, including a motion for summary judgment, compared to the record that had been transmitted to the court of appeals two years earlier. *Id.* at 56a. The district court explained that the record did not support the contention that a Philippine court was about to rule on the forfeiture of the Arelma assets. *Id.* at 56a-57a. The court noted that the long-awaited 85-page decision issued by the Philippine Supreme Court on July 15, 2003 did not even mention Arelma. *Id.* at 56a.

The district court noted that because the Republic had known about the Arelma Account since 1986 and had obtained an injunction from a federal court with regard to this Account in 1987, the Republic's claim to the assets would be barred by the applicable New York statutes of limitations, *id.* at 56a-57a, and hence was not "legally protectible." *Id.* at 58a. The district court specifically held that because the

Republic would not be bound by the judgment or findings in the case, its claim would not be impaired:

> Neither res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party.

Id. at 58a. The court of appeals affirmed the lifting of the stay on February 20, 2004, clearing the way for trial. *Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc.*, Nos. 03-16742, 03-16743 (9th Cir. Feb. 20, 2004), JA25-27.

At trial, the members of the Class of Human Rights Victims prevailed in proving that Arelma was an *alter ego* of Ferdinand Marcos and that their claim as judgment creditors had priority to the interpleaded assets. Tr.Ct.Op., Pet.App. 53a-54a. The claim of PNB, based on its possession of the Arelma stock certificates, was denied based on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which confirmed that an individual shareholder does not own a corporation's assets.[5] *Id.* at 52a. The claims of the remaining parties, the Roxas Estate and the Golden Budha Corporation, were denied since (a)

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[5] The Republic's argument that the Arelma Account is a "subset" of Marcos' Swiss assets, Pet.Br. at 5, and should "follow the [Arelma] shares," transferred to it by Swiss authorities, Pet.Br. at 40-41, is legally and factually wrong. The Swiss government never had possession or control of the assets in the Merrill Lynch account, and the Republic of the Philippines never owned the Arelma share certificates. Tr.Ct.Op., Pet.App. 46a.

their prior judgments were not against Ferdinand Marcos or his Estate, and (b) they failed to prove the Account assets derived from property stolen from them.[6] *Id.* at 53a-54a.

Four days after entry of the district court's July 12, 2004 judgment, JA90, the Republic filed a motion in a Philippine trial court to reopen long-closed litigation there, asking that court to find that the Arelma assets – which had been in the United States for more than three decades and in the custody of the district court for four years – were the property of the Republic. *See Republic of the Philippines vs. Heirs of Ferdinand E. Marcos et al.*, No. 141 (Sandiganbayan, 1st Div.). This motion, which omitted mention of the U.S. judgment, specifically referred to the Arelma Account and asked the Philippine court to declare "the funds, properties, shares and interests of Arelma, Inc. as forfeited in favor of the Republic." The parties to that proceeding are limited to the Republic and the Marcoses, and the Human Rights Victims have been excluded from participation. Pet.App. 10a, 59a. Now, three-and-a-half years later, the Philippine court still has not ruled on the motion.

In 2006, the court of appeals affirmed the judgment in favor of the Class of Human Rights Victims.[7]

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[6] A Petition for Certiorari, No. 06-1039, by these parties is pending before this Court.

[7] Although the Class twice argued that the Republic as a nonparty lacked power to appeal, *see* JA92-98 and Pimentel's Ninth Circuit Brief at 28, the court of appeals did not address

(Continued on following page)

Merrill Lynch, Pierce, Fenner and Smith, Inc. v ENC Corporation, 464 F.3d 885 (9th Cir. 2006) [hereinafter "Ct.Ap.Op."], in Petitioner's Appendix to its Certiorari Petition [hereinafter "Pet.App."] at 1a-11a. The court of appeals understood that the four factors listed in Rule 19(b) are directly fact-based and examined the "circumstances and practicalities of the Republic's claim" to determine whether the judgment rendered in its absence "'might be prejudicial to [it] or those already parties.'" *Id.* at 4a (quoting Rule 19(b)). It then examined two specific scenarios that could follow if the Republic were deemed indispensable, and concluded that "it is doubtful that the Republic has any likelihood of recovering the Arelma assets" because "[t]he res is in the United States" and [i]t cannot be finally disposed of except by the judgment of a court in the United States." *Id.* at 7a-8a. The court of appeals recognized that any effort by the Republic to pursue the Arelma assets in an action against Merrill Lynch in New York would be barred by New York's six-year statute of limitations. *Id.* at 8a (citing N.Y. C.P.L.R. sec. 213, and also citing *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 115 (1968), for the proposition that the Republic's "failure to secure a judgment affecting these assets is a factor to be taken into account"). *Id.* at 7a. The court of appeals explained that any judgment the Republic might obtain in the Philippines

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the issue, because it ruled for the Class on the Rule 19(b) issue. *See* Ct.Ap.Op., Pet.App. 9a-11a.

would be unenforceable, because the Philippine court would have no jurisdiction over the *res* – the Arelma Account assets – and if a Philippine court were to issue a ruling regarding these assets, "a court of this country would not be bound to give it effect." *Id.* at 8a. *See also Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 467 F.3d 1205, 1207 (9th Cir. 2006), Pet.App. 61a, where the court of appeals noted that the Philippine Supreme Court had previously "categorically declared" that its forfeiture proceeding regarding Marcos assets "is *in rem*," citing *Republic of the Philippines v. Sandiganbayan* (Nov. 18, 2003), and also citing *Restatement (Third) of the Foreign Relations Law of the United States* § 482(2)(a) (1987) for the proposition that "any judgment made without proper jurisdiction is unenforceable in the United States." The court of appeals noted explicitly that the Republic is not bound by the present proceeding, "because it is not a party to the action," and that it is not formally prejudiced because it remains free to pursue a claim against Merrill Lynch in the United States (although its odds of success are extremely low because of New York's six-year statute of limitations). Ct.Ap.Op., Pet.App. 8a-9a.

The court of appeals completed the balancing process required by Rule 19(b) by concluding (a) that "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it," *id.* at 9a; (b) that although the Arelma assets are not adequate to satisfy the Human

Rights Victims $2 billion award, nonetheless "the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them," *id.*; (c) that if this interpleader were to have been dismissed on the basis of indispensability, the Human Rights Victims would have no alternative forum open to them in the Philippines, *id.*; and (d) that the Human Rights Victims could be required to sue in New York but such a requirement would impose "a needless repetition that will not benefit the Republic." *Id.* The court of appeals noted that it would be unrealistic to direct the Human Rights Victims to "find redress from their own government" because – despite the passage of 21 years since Marcos was forced out of office – "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." *Id.* at 9a-10a. The court of appeals then concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." *Id.* at 9a.

Shortly after the decision of the court of appeals, the district court ordered the first distribution of monies to Class members since the time they had initiated litigation against Marcos in 1986.[8] The

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[8] By stipulation, the parties in the instant case, pending appeal, transferred the assets at issue to the *Marcos Human Rights Litigation*, MDL 840, pending in the same court. The distribution order was entered in MDL 840.

district court ruled that each eligible class member will receive, initially, $2,000, upon issuance of the mandate. *In re Estate of Ferdinand E. Marcos Human Rights Litigation,* MDL No. 840, Order of June 26, 2006, JA103-104. The overwhelming number of Class members are impoverished and exist in a cycle of poverty. In a country where the median per capita income is $1,600 per year, this first distribution "will have monetary meaning for the poor among them." Ct.Ap.Op., Pet.App. 9a.

Other collection efforts by the Class have been stymied, not just by the well known fact that Marcos concealed his wealth,[9] but also by the unwillingness of the Philippine courts to allow the Class members to file their judgment in order to pursue collection possibilities in the Philippines. In 2007, the United Nations Human Rights Committee found that this refusal constituted a violation of the Class members' rights under international law. *See Pimentel v. The Philippines*, Communication No. 1320/2004 (Mar. 19, 2007), RA-12-23. The Committee found that the

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[9] The 1995 judgment included the following finding:

> Ferdinand and Imelda Marcos engaged in a sophisticated pattern and practice of secreting their assets, periodically laundering those assets in various countries, and redepositing the monies in Swiss bank accounts in the names of the multiple Liechtenstein foundations.

In re Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840, Final Judgment (D. Hawaii Feb. 3, 1995), JA49, 57.

obstructive procedures employed by the Philippine courts (the trial court required the Class members to pay a filing fee of US$8,400,000 and the Philippine Supreme Court took eight years and three months to overturn this ruling) violated the rights of the Class members under Articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights, Dec. 9, 1966, 1999 U.N.T.S. 1711:

> The Committee is of the view that the authors [the Class] are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

Human Rights Committee, para. 11, RA-23.

The Republic has never compensated the Class members for the abuses they suffered during the Marcos regime, Ct.Ap.Op., Pet.App. 9a-10a, although a decision of the Swiss Federal Court in 1997 specifically held that international law required the Republic to compensate the Victims. *Swiss Federal Office for Police Matters v. Fondation Maler,* 1A.91/1997/odi (Swiss Federal Court (Bundesgericht, Dec. 19, 1997), Ex. 47, JA64, 84 para. 7a.

Following two motions for reconsideration and for *en banc* review in the court of appeals, Petitioners

filed a petition for certiorari with this Honorable Court. This Court granted certiorari on December 3, 2007 adding the additional issue of whether the Republic and PCGG had power to appeal the judgment to the court of appeals and to this Court. PNB and Arelma did not seek certiorari of the court of appeals' ruling that the Class had priority over their claims.

SUMMARY OF ARGUMENT

1. The Republic does not have power to appeal the judgment. It made the strategic determination to withdraw from this interpleader, it chose not to intervene into the trial proceeding even after the trial judge ruled that it was not an indispensable party, and it is not bound in any way by the rulings made by the lower courts during the course of this interpleader procedure. Allowing the Republic to appeal at this point is contrary to the core principle that only parties (or those that intervene) can appeal, will disrupt the orderly conduct of litigation, and will make it more difficult for trial courts to bring about closure.

Arelma and PNB lack standing to raise the issue of the Republic's indispensability on appeal, because they no longer challenge the lower courts' rulings that they are not entitled to the disputed assets and hence have no further direct interest in the outcome of this litigation.

2. The lower courts followed the language of Rule 19(b) and this Honorable Court's guidance in *Provident Tradesmen Bank*, 390 U.S. 102, in determining that the Republic was not an indispensable party to the interpleader. Their decisions, made after weighing all relevant factors under the standard of equity and good conscience, were not an abuse of discretion.

The Republic has participated actively in litigation in U.S. courts regarding purported Marcos assets; it has never previously asserted sovereign immunity in those actions; it has known about the Arelma assets since at least 1986; and it sought and obtained the assistance of a U.S. court to freeze these assets in 1987. Prior to entry of the interpleader judgment, the Republic never made any effort whatsoever to establish its claim to ownership of these assets, in either a Philippine or a U.S. court. The lower courts, based on the factual record developed in this interpleader, both concluded that the assets were owned by Ferdinand Marcos, and determined that the Class of Human Rights Victims were entitled to these assets. The Republic made the strategic decision to withdraw from the interpleader, and it should be bound by the consequences of its decision.

The court of appeals also determined that if this interpleader proceeding is dismissed, the members of the Class "will have no forum within the Philippines open to their claims," and that a proceeding against Merrill Lynch in New York "would merely raise the same question of indispensability." Ct.Ap.Op.,

Pet.App. 10a. The Human Rights Victims have tried to pursue collection efforts in the Philippine courts, but have been stymied in their efforts, and the United Nations Human Rights Committee has ruled explicitly that the failure of the Philippine Courts to permit collection efforts constitutes a violation of the obligations of the Philippines under Article 2(3) of the International Covenant on Civil and Political Rights.

The Republic's effort to dismiss the interpleader at this point is not supported by any evidence or offer of proof substantiating its contention that it is the legitimate owner of these assets. If this Court were to dismiss the interpleader, its ruling would allow any foreign governmental body to block any interpleader or any other proceeding brought by any judgment creditor to collect its judgment merely by asserting a claim to the assets in question without having to present any evidence to substantiate its claim.

3. No significant negative foreign policy consequences will follow if the independent courts of the United States apply logical legal principles to determine ownership of assets long-held in the United States. The *amicus curiae* brief filed by the United States makes no claim that any adverse consequences regarding U.S. foreign relations will follow if this Court affirms the rulings below. Petitioners contend that they will be disadvantaged by such a ruling, because the disputed assets are, they say, "matters of the greatest political sensitivity and importance," Pet.Br. at 48, but they offer no specifics. Nor do Petitioners address the inconsistency between their

present contentions and the position the Republic expressed in the *amicus curiae* brief filed in 1987, which stated "without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims are heard in U.S. courts." RA-11 (emphasis in original).

Courts must, of course, give careful consideration to foreign policy concerns raised by foreign governments, but the need to defer to such concerns is minimal when the courts possess *in rem* jurisdiction over the assets at issue and the matter concerns procedural issues related to the courts' management of their dockets. Here, no contention is made that the claims of the Class of Human Rights Victims should not have been pursued or that the judgment in favor of the Victims was unwarranted.

ARGUMENT

I. The Republic Has No Right To Appeal

A. Only "parties" to a judgment have a right to appeal therefrom.

This Honorable Court has "consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May*, 484 U.S. 72, 77 (1987). This rule has been "very well settled" for at least 150 years. *See, e.g., Payne v. Niles*, 61 U.S. (20 How.) 219, 221 (1858) ("[I]t is very well settled in

all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court, unless he was a party to the judgment in the court below. . . ."). This jurisdictional limitation on appellate rights is embodied in Rule 3 of the Federal Rules of Appellate Procedure, which provides for the filing of a notice of appeal by "parties." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*) (citing Fed. R. App. P. 3). It is likewise codified in 28 U.S.C. § 1254(1) – Petitioners' asserted basis for this Court's jurisdiction – which provides for writs of certiorari "granted upon the petition of any party. . . ." 28 U.S.C. § 1254(1). *Cf. Karcher*, 484 U.S. at 81 (dismissing for lack of jurisdiction where the appellants were not "parties" under the previous version of § 1254(2)).

B. The Republic was not a party to the judgment and was not treated as a party to the judgment.

The naming of the Republic in the complaint is not controlling on the question whether it may appeal from the judgment. "The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). Thus, depending on the procedural development of the case and the strategic choices made, a litigant can lose "party" status. *See Karcher*, 484 U.S. at 81 (holding that intervenor appellants lost "party" status during the appeals). The relevant "context" here is that the

Republic successfully opposed its joinder as a party in the district court, then elected to sit on the sidelines while the remaining parties litigated the Republic's alleged indispensability and their competing claims to the Arelma assets. As a consequence of its strategic decision, the Republic lost any right it might have had to appeal from the judgment.

Contrary to the Petitioners' argument, Pet.Br. at 24, 29, the dismissal of the Republic was not a "technical matter." Having invoked foreign sovereign immunity, the Republic avoided joinder as a party and was neither subject to the district court's jurisdiction nor bound by its judgment. The district court explained that "[n]either res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party," Tr.Ct.Op., Pet.App. 58a, and the court of appeals agreed that "any judgment entered in this action cannot bind the Republic because it is not a party to the action," Ct.Ap.Op., Pet.App. 8a, a conclusion that Petitioners do not contest. The Republic was not, therefore, a "party" to the judgment from which it now seeks to appeal. *See Devlin*, 536 U.S. at 10-11 (permitting an appeal as "petitioner's only means of protecting himself from *being bound by a disposition of his rights*") (emphasis added). *See also id.* at 9 (distinguishing the petitioners in *Marino* on the basis that "the District Court's decision *did not finally dispose of any right or claim* they might have had") (emphasis added). As *amicus* Merrill Lynch notes, the Republic still has what it always claimed to have – a

contingent claim against Merrill Lynch. Merrill Lynch Br. at 27-29.

The Republic's status in the present case is thus similar to its status in *Hilao v. Estate of Marcos*, 393 F.3d 987 (9th Cir. 2004), where the court of appeals ruled that the Republic was a "nonparty" to the district court's actions regarding a settlement agreement and an "Order Directing Compliance" issued to banks holding disputed assets. Because the Republic was not bound by the settlement agreement "its argument for nonparty appellate standing to challenge that same agreement collapses." *Id.* at 993. Similarly, an Order Directing Compliance by financial institutions did not "bind[], [n]or was meant to bind, the Republic," and hence the Republic could not challenge it. *Id.* at 994. Notwithstanding the Republic's claim that the Compliance Order "interfered with its efforts . . . to collect all funds," the court of appeals held that "inconvenience to the Republic, however, does not rise to the level of an 'exceptional circumstance' justifying nonparty standing to appeal." *Id.* (citation omitted).

Nor was the Republic "treated as a party" in the district court following its dismissal. The court of appeals ordered its dismissal on sovereign immunity grounds but remanded with directions to stay the litigation because later events could affect the indispensability determination. 2002 Ct.Ap.Op., Pet.App. 30a. Thereafter, the Republic avoided the district court proceedings. *See* Pet.Br. at 9 (stating that the

Republic was "absent from the litigation" after the district court lifted the stay).[10]

More importantly, the Republic made no further effort to press its indispensability arguments in the district court. It was not until Arelma and PNB renewed their Rule 19(b) motion that the district court proceeded to determine the Republic's claimed indispensability. Tr.Ct. FOF/COL, Pet.App. 55a-60a. The Republic neither sought to intervene nor otherwise to be heard at the evidentiary hearing. It took no exception to the district court's findings of fact and conclusions of law denying Arelma's and PNB's motion, including the district court's finding that "[t]he Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets," and that "[t]he Republic and PCGG must accept 'the disadvantages as well as the advantages

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[10] After the court of appeals remanded for dismissal of the Republic, counsel for the Republic did appear informally at a district court hearing to spread the appellate mandate and rule on Respondent's motion to lift the stay, but expressly reserved the Republic's immunity. Hearing Transcript, 6/20/2003, at 3, 19-20. After the district court lifted the stay, the Republic petitioned for leave to appeal. Pimentel moved to strike the petition on the ground that the Republic, having invoked sovereign immunity and having failed to intervene, was a nonparty with no right to appeal. The court of appeals affirmed without addressing the motion to strike. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Pimentel*, Nos. 03-16742, 03-16743 (9th Cir. Feb. 20, 2004), JA25-27.

that flow from' their 'strategic election.'" Tr.Ct. FOF/COL, Pet.App. 58a-59a (citing *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987)).[11]

C. The Republic failed to intervene to assert its indispensability and preserve a right to appeal.

Contrary to Petitioners' argument, Pet.Br. at 20, an appeal from the judgment was not the "only means" for the Republic to protect its interests. *Devlin*, 536 U.S. at 10. As the U.S. *amicus curiae* brief notes, the Republic could have intervened as of right pursuant to Rule 24 after its dismissal, for the limited purpose of asserting its own indispensability, without consenting to jurisdiction generally. *See* U.S. Br. at 15; *see also Marx v. Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (holding that Guam could challenge the district court's jurisdiction to proceed in its absence, without risk of waiving its sovereign immunity). The Republic also could have sought intervention post-judgment for purposes of appeal. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 (1977). Such intervention would have afforded the Republic with appellate rights. *Karcher*, 484 U.S. at 77. Further, the denial of an intervention motion is

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[11] "While we do not fault that strategic election, we must hold that the appellant must accept the disadvantages as well as the advantages that flow from it." *Citibank*, 809 F.2d 1438, 1441 (9th Cir. 1987).

itself immediately appealable. *Marino*, 484 U.S. at 384.

However, the mere opportunity to intervene does not confer appellate rights. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin v. Wilks*, 490 U.S. 755, 765 (1989). The Republic eschewed intervention and adopted a different strategy, one that forced the district court and the remaining parties to litigate the indispensability questions in its absence. This election to sit on the sidelines has consequences. *Id.* at 770 (Stevens, J., dissenting) ("One of the disadvantages of sidelinesitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be."). Because the Republic could have sought intervention but chose not to, the Court should reject its attempted end-run around the rule that only "parties" can appeal. *Marino*, 484 U.S. at 304 ("We think the better practice is for such a nonparty to seek intervention for purposes of appeal").

The intervention requirement is not a meaningless formality. Instead, it prevents litigants from gaming the federal court system by permitting the district court, in the first instance, to resolve the scope of an intervenor's "party" status and participation, preferably *before* an issue is decided and *before* an appeal is taken. *See Devlin*, 536 U.S. at 21 (Scalia, J., dissenting) (noting that intervention permits the

district court "'to perform an important screening function'") (citation omitted). And as the United States argued in *Devlin*, "the Federal Rules permit courts to place conditions on the scope of intervention, and that includes restrictions on discovery." U.S. Br. in *Devlin v. Scardelletti*, 2002 WL 352118 at *26 (2002) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987)).[12]

Logic requires a rule mandating that a foreign government, asserting immunity, must intervene on a limited basis to assert its indispensability to an interpleader proceeding if it wishes to appeal from the judgment. A foreign government asserting sovereign immunity simply seeks to block its own joinder on jurisdictional grounds. By contrast, an assertion of indispensability invokes equity to preclude the parties and the court from proceeding to judgment[13] – a

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[12] In *Devlin*, the United States argued that class member objectors should be required to intervene in order to appeal the approval of a mandatory class settlement that bound them over their objections, because the intervention requirement allows the district court to exercise control over, and place appropriate conditions, on the scope of the objectors' participation. *Id.* Although the Court held that intervention was not required in *Devlin*, that holding is easily distinguishable from the present situation, because the appellants in *Devlin* were bound by the judgment in that case. *Devlin*, 536. U.S. at 7. Here, the Republic is not bound by the interpleader judgment.

[13] The nature of the indispensability inquiry is equitable, not jurisdictional. *See* 7 C. Wright, *et al.*, *Federal Practice & Procedure* § 1611, at 169 (3d ed. Supp. 2007) (citing *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827)).

discretionary, fact-bound inquiry that implicates the interests of all the parties and "can only be determined in the context of particular litigation." *Provident Tradesmens Bank*, *supra*. The lack of an intervention requirement would place the district court and the other parties in the untenable situation of attempting to resolve a sovereign's claim of indispensability without the ability to order complete discovery and litigation on that claim.

An intervention requirement thus prevents a foreign government from using its immunity as both a shield and as a sword – precisely what the Republic asks this Court to authorize here. It simultaneously claims the right to appeal from a determination of its indispensability while rejecting any concomitant burden to present evidence on its contention in the first instance. It seeks to preserve its sovereign prerogative to sit on the sidelines, while reserving the right to assert error in the district court's resolution of those issues in its absence. Nothing in either Rule 19 nor the principles governing foreign sovereign immunity requires the federal courts to tolerate such strategic manipulation, especially in light of the ready availability of limited intervention that preserves that government's immunity.

This Court has previously dismissed appeals by states for lack of jurisdiction where the state asserted an interest in the property in suit as a basis for dismissal, but refused to consent to jurisdiction and failed to intervene. In *South Carolina v. Wesley*, 155 U.S. 542 (1895), the plaintiff sued the South Carolina

secretary of state for possession of land occupied by the state. Before trial, the South Carolina attorney general appeared and filed a "suggestion" that the court lacked jurisdiction to proceed because the State owned the property and would not consent to jurisdiction. *Id.* at 543-44. The trial court denied the suggestion, proceeded to trial and awarded possession to the plaintiff. This Court dismissed South Carolina's writ of error, reasoning that "[t]he state was not a party to the record in the trial court, and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court." *Id.* at 545.

The *Wesley* court cited *Georgia v. Jesup*, 106 U.S. 458 (1882), a receivership action brought against assets of a railroad located in Georgia. Before the final foreclosure decree issued, the Georgia attorney general appeared and petitioned to dismiss or stay the proceedings for lack of jurisdiction, asserting sovereign immunity and claiming that the state had a priority claim to the assets. *Id.* at 459-60. The trial court denied the state's petition and entered the foreclosure decree, and Georgia appealed to this Court. *Id.* at 461. This Court held that because the state refused to submit to jurisdiction and was not bound by the decree, the order denying the state's dismissal petition "is not one which the state can ask this court to review upon its appeal; this, for the reason already indicated, that the order did not conclude the state – it being no party to the suit – as to any right acquired by virtue of the executions for

taxes." *Id.* at 463. Significantly, this Court observed that even if the state had priority under Georgia law, that priority was not affected because there was no adjudication of the state's rights. *Id.* at 463-64.

A foreign government with statutory immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1391, 1441(d), 1602-11, surely has no greater appellate rights than a state that has an organic, constitutional immunity from suit. The Republic of the Philippines is no different in any relevant respect from the sovereign states in *Wesley* and *Jesup*. The Republic was not a party in the district court and, after its dismissal, it neither acted like a party nor was treated like a party. It invoked sovereign immunity nearly from the outset of the proceedings and refused to submit its claims to the jurisdiction of the district court. It is not bound to the judgment. It failed to seek intervention. Therefore it was not a party in the district court and has no right to appeal the denial of indispensable party status and the judgment of the district court.

Petitioners and the U.S. *amicus* brief cite *Minnesota v. United States*, 305 U.S. 382 (1939), as precedent for finding appellate rights in this case, even though (as the United States concedes) the Court *never considered the issue* of appellate rights in that case. Pet.Br. at 23, U.S. Br. at 16-17. Moreover, unlike in the present case, the court of appeals in *Minnesota* dismissed the entire litigation on the Government's interlocutory appeal and did not remand for further development and consideration of the Government's

indispensability arguments. *United States v. Minnesota*, 95 F.2d 468, 473 (8th Cir. 1938). Thus, at no time in the *Minnesota* litigation did the United States opt to sit on the sidelines as a nonparty and permit a court to resolve indispensability in its absence. Here, however, the Republic made the strategic decision not to pursue further its assertion of indispensabilty in the district court.

The Petitioners' "collateral order" analogy also fails. Pet.Br. at 23-24. The collateral order doctrine permits interlocutory appeals from certain types of orders by persons who were bound by, and thus were "parties" to, those orders, even though they would not be bound by the subsequent judgment in the litigation. *Devlin*, 536 U.S. at 16-17. Here, by contrast, the Republic claims a right to appeal from a *judgment* to which it is *not* bound. *Id.* (distinguishing the right to appeal from a judgment from the right to appeal from a collateral order). Nor was the Republic a party to the district court's order denying Arelma's and PNB's renewed Rule 19(b) motion, Tr.Ct. FOF/COL, Pet.App. 55a, because it was not the Republic's motion and the Republic never intervened to support it. And unlike a collateral order, the district court's order does not purport to require the Republic to do (or not do) anything. *See Devlin*, 536 U.S. at 17 (citing *Hinckley v. Gilman, C. & S.R. Co.*, 94 U.S. 467 (1876)).

Litigation choices have consequences. The decision of the Republic to claim immunity and its failure to intervene on the question of its indispensability

had the consequence of foreclosing it from appealing the judgment.

II. The Court Must Dismiss The Appeal As To Arelma And Philippine National Bank Because They Lack Power To Appeal And No Live Controversy Remains As To Them.

This Court independently scrutinizes whether particular petitioners present a sufficient case or controversy to create Article III standing. *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 1859 (2006). The Petitioners and the United States argue that Arelma and PNB have a right to raise the Rule 19(b) issue even if the Republic does not. Pet.Br. at 16; U.S. Br. at 9. But Rule 19(b) appeals are not riderless horses. Since Arelma and PNB suffered no injury from the denial of their Rule 19(b) motion, and they no longer challenge the denial of their claims to the Arelma assets on the merits, there is no live controversy as to them and they therefore lack standing to appeal.

The district court denied the claims of Arelma and PNB on the merits after a trial. Tr.Ct.Op., Pet.App. 52a-54a. The court of appeals affirmed the judgment stating that neither Arelma (a "shell corporation") nor PNB ("as escrow holder") "now have an interest to be protected." Ct.Ap.Op., Pet.App. 10a. Neither Arelma nor PNB sought certiorari of that merits determination in this Court, and any such

challenge is therefore waived. *Cf. Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("Only the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court") (quoting Sup. Ct. R. 14.1(a)); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992) (same).

Indeed, Arelma and PNB apparently now support the Republic's claims of ownership of the account. However, a litigant generally lacks standing to advance the rights of others. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972). Rather, standing requires "personal injury fairly traceable to the [opposing party's] unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler*, 126 S.Ct. at 1861 (2006). In *DaimlerChrysler,* this Court found no Article III standing because there was no injury that was "concrete and particularized." *Id.* at 1862. "[T]he injury is not actual or imminent, but instead conjectural or hypothetical." *Id.* Similarly, any "injury" to Arelma and PNB from the decision to proceed in the Republic's absence is conjectural and hypothetical given the unchallenged merits rulings. Since Arelma and PNB have abandoned any claims to the interpleaded assets, they are in no way "aggrieved" by the judgment of the court of appeals, and therefore lack standing to appeal that judgment. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980).

Article III jurisdiction requires that a live controversy must exist at every stage of review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "That the dispute

between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig v. Doe*, 484 U.S. 305, 307 (1988). This Court has observed that Article III jurisdiction can be destroyed by a party's choices about which rulings to appeal. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977). Here, Arelma and PNB chose not to seek certiorari to challenge the rulings that their claims failed on the merits.

The failure of Arelma and PNB to preserve their "requisite personal interest" in the subject matter of the litigation means that the Court now lacks jurisdiction over their appeal. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). For example, in *Ashcroft v. Mattis* this Court held that the petitioner's failure to preserve a challenge to a merits-based ruling on an affirmative defense rendered the case moot. 431 U.S. at 171-72. Because there was no longer any dispute over the merits of the liability claim, the petitioner lacked a present interest in controversy and could not appeal. *Id.* at 172-73.

An interpleader case from the First Circuit is instructive. In *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48 (1st Cir. 2004), Massachusetts successfully asserted immunity but was held not to be an indispensable party. *Id.* at 51. The district court proceeded to judgment in the Commonwealth's absence and awarded the interpleaded assets to a private claimant. *Id.* at 52. The Commonwealth

appealed the indispensability ruling but failed to challenge the priority of the judgment winner's claim. *Id.* The First Circuit dismissed the appeal, holding that the Commonwealth's failure to challenge the ultimate disposition of the interpleaded fund rendered moot the issue of its indispensability. *Id.* at 53. The court noted that its holding could be premised on a loss of standing to appeal. *Id.* at 53 n.1.

Regardless of whether the result is based on mootness principles or a loss of appellate standing,[14] the point is that neither Arelma nor PNB has any present interest to be protected in the litigation as a whole, or in a Rule 19(b) determination.[15] Without a viable claim to the assets, the indispensability of the Republic is a purely abstract proposition as to Arelma and PNB, and their appeal must be dismissed for lack of standing.

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[14] As this Court observed in *Geraghty,* mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Geraghty*, 445 U.S. at 397 (*citations omitted*).

[15] Petitioners argued in a footnote to their petition for a writ of certiorari that "The decision also places PNB, the nominal owner of Arelma, in an untenable position because the bank is a party to escrow agreements, entered into at the direction of the Swiss Federal Supreme Court, requiring it to dispose of the Arelma assets as directed by the appropriate Philippine court." Cert.Pet. at 11 n.5. PNB fails to articulate any detrimental consequence of this position, especially given their failure to continue to pursue the merits of their claims.

Both Petitioners and the United States rely on *Minnesota v. Northern Sec. Co.*, 184 U.S. 199 (1902), for the proposition that appellate courts must act *sua sponte* to protect the rights of absent indispensable parties. Pet.Br. at 18, U.S. Br. at 17. The United States also cites *Hanson v. Denckla*, 357 U.S. 235 (1958), for the proposition that Arelma and PNB have a right to raise the lack of an indispensable party on appeal. U.S. Br. at 10. But both of these propositions assume the presence of a party with the requisite personal stake in the litigation to support standing to appeal.[16] Since Arelma and PNB no longer challenge the district court's conclusions on the merits of their claims, their claims are deemed moot and they have no standing to appeal *at all*.

III. The Republic Is Not An Indispensable Party Under Rule 19(b).

An interpleader action commenced under 28 U.S.C. § 1335 is unlike a conventional lawsuit. It is brought by a plaintiff stakeholder who willingly deposits the *res* with the court and who seeks only the remedy of a discharge order. The defendants are not true defendants. They are claimants who have asserted entitlement to the *res*. They are not required to

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[16] "[A]ny defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson*, 357 U.S. at 245 (*citing Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77 (1958)).

present evidence in support of their claims, but they must do so if they expect to prevail in the interpleader proceeding. They do not risk entry of a judgment against them for a money judgment. Properly considered, an interpleader complaint is an invitation to make a claim. Accordingly, many of the policy concerns underlying foreign sovereign immunity are not present in an interpleader, and the factors set forth in Rule 19(b) favor maintenance of an interpleader, not dismissal.

A. The lower courts' Rule 19(b) determination is reviewable under an abuse of discretion standard.

This Court has not squarely considered the standard of review applicable to a district court's Rule 19(b) determination, and neither the Petitioners nor the Solicitor General address the standard of review in their briefs. The courts of appeals have reached a consensus[17] on this issue that, because Rule 19(b)

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[17] Only the Sixth Circuit reviews Rule 19(b) determinations *de novo*. *Glancy v. Taubman Centers, Inc.* 373 F.3d 656, 665 (6th Cir. 2004). All other circuits review for abuse of discretion. *See Travellers Indemnity Co. v. Dingwell*, 884 F.2d 629, 635 (1st Cir. 1989); *Universal Reinsurance Co., Ltd. v. St. Paul Fire and Marine Ins. Co.*, 312 F.3d 82, 88 (2d Cir. 2002); *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007); *American General Life and Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005); *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 393 (5th Cir. 2006); *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 361 (7th Cir. 2004); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001); *Davis ex rel. Davis v.*

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determinations are fact-intensive and require a balancing of interests based on pragmatic considerations, "*de novo* balancing should not occur on appeal; instead, the district court's application of Rule19(b)'s 'equity and good conscience' test should be reviewed under an 'abuse of discretion' standard." *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Washington*, 699 F.2d 1274, 1276-77 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.) (citing *Walsh v. Centeio*, 692 F.2d 1239, 1241-43 (9th Cir. 1982)).

This Court's decision in *Provident Tradesmens Bank*, *supra*, is not to the contrary. Although the Court balanced the Rule 19(b) factors *de novo*, the Rule 19(b) issues in that case were first raised in the court of appeals so there were no district court findings entitled to deference. 390 U.S. at 109. Here, where the district court took evidence and engaged in fact-finding in the first instance, the district court's determination is entitled to particularly wide latitude consistent with the "equity and good conscience" standard provided in Rule 19(b). *See Cloverleaf*, 699 F.2d at 1277 (stating that the "equity and good conscience" standard "'leaves the district judge with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go

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United States, 343 F.3d 1282, 1289 (10th Cir. 2003); *United States v. Rigel Ships Agencies, Inc.*, 432 F.3d 1282, 1291 (11th Cir. 2005); *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1362 (Fed. Cir. 2006).

forward in the absence of someone needed for a complete adjudication of the dispute,'" quoting from 7 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1604 at 45-46 (1972)). *See also Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 361 (7th Cir. 2004) (reviewing for abuse of discretion "[b]ecause of the looseness of the terms 'equity and good conscience' and because their applicability is to be determined in each case by weighing several factors with no weights indicated").

This Court emphasized in *Provident Tradesmens Bank* that the approach of a reviewing court post-trial is different from the analysis applied by the initial court, because "[a]fter trial, considerations of efficiency" such as "the time and expense" involved in the trial militate in favor of denying a Rule 19(b) motion. *Id.* at 111; *see also id.* at 112 (explaining that [o]n appeal . . . [the] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations that would be required at an earlier stage" when the "only concern" was which forum to choose).

In the present case, to be sure, the court of appeals also did not address the standard of review, and its decision reflects a *de novo* balancing.[18] However,

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[18] The Class preserved the issue of the correct standard of review, having argued their merits brief in the court of appeals for application of the Ninth Circuit's abuse of discretion standard. *See* Pimentel's Merits Brief in *Merrill Lynch v. ENC Corp.*, Nos. 04-16503, 04-16538, 04-16503, filed 11/30/2004, at 17.

insofar as the court of appeals affirmed the judgment of the district court, the court of appeals' reasoning should be viewed as supplying alternative grounds and additional reasons for affirming the judgment.

B. The lower courts properly applied Rule 19(b) pursuant to the instructions of this Court in *Provident Tradesmens Bank*.

The lower courts interpreted and applied the language of Rule 19(b) of the Federal Rules of Civil Procedure by following this Honorable Court's decision in *Provident Tradesmens Bank*, 390 U.S. at 109 and 118, which instructed courts to look through the lens of "'equity and good conscience'" and to determine indispensability "'in the context of [this] particular litigation.'" Ct.Ap.Op., Pet.App. 4a-5a. This Court explained that a decision on whether a party is indispensable "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank*, 390 U.S. at 118-19. The four factors listed in Rule 19(b) are directly fact-based, and so it is essential and inevitable that a court examine the practical issues related to a party's participation in a trial.[19] The court

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[19] Contrary to Petitioners' contention, Pet.Br. at 34, the court of appeals *did not evaluate the merits of the Republic's asserted claim*, but instead *assumed the validity of the claim* and

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of appeals also followed the guidance provided by this Court in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), which explained that the "equity" called for in Rule 19(b) requires courts to exercise "flexibility . . . marked by 'mercy and *practicality*.'" Ct.Ap.Op., Pet.App. 6a (emphasis added). This Court has explained that "[a] court of equity will strain hard" to avoid dismissal. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

1. The Class would be prejudiced by a dismissal.

The Class of Human Rights Victims, which prevailed on the merits following years of hard fought and expensive litigation, would be severely prejudiced by a dismissal. The Class members, some of whom were tortured or summarily executed as early as 1972, have waited decades for relief, first to obtain their judgment and then to collect a portion of it. If the present claim were to be dismissed pursuant to the views of the Republic and the U.S. *amicus curiae* brief, the Class would have no alternate forum in which to pursue its claims, because it has no right to intervene in the Republic's forfeiture proceedings, and it would be obliged to sue Merrill Lynch, thus raising the same issues presented in this action.

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determined that even if it were valid the Republic was barred by the statute of limitations from pursuing the claim. Ct.Ap.Op., Pet.App. 8a.

Dismissal of this interpleader would also prejudice the interpleader plaintiff, Merrill Lynch. Merrill Lynch acted responsibly by initiating this interpleader and naming as "defendants-claimants" all individuals who had asserted any entitlement to the Arelma assets. Merrill Lynch Complaint, JA12-13. Merrill Lynch has been discharged from the litigation. Discharge Order, JA22. Dismissal of the entire interpleader after these many years of litigation would ensnare Merrill Lynch, the stakeholder, in costly and protracted future lawsuits.

By contrast, the Republic has no real negative consequences because it is still free to bring a claim against Merrill Lynch and it can pursue Marcos assets from numerous other sources in many other venues. As the court of appeals held after considering all litigation avenues open to the Republic, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." Ct.Ap.Op., Pet.App. 7a. Merrill Lynch has conclusively demonstrated in its brief *amicus curiae* that any lawsuit that might be brought by the Republic against Merrill Lynch would be barred by a New York statute of limitations. Merrill Lynch Br. at 26-28. The Republic has been aware of the Arelma assets since 1986 but has yet to establish its right to these assets in any court in the world. Ct.Ap.Op., Pet.App. 7a. The court of appeals concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." *Id.* at 9a.

2. The Republic is not bound by the judgment.

The Republic is expressly not bound by the interpleader judgment. *See Provident Tradesmens Bank*, 390 U.S. at 110; Ct.Ap.Op., Pet.App. 8a. No findings of fact or conclusions of law will bind it via *res judicata* or collateral estoppel. Tr.Ct. FOF/COL, Pet.App. 58a. As the court of appeals stated when it denied the Republic's second motion for reconsideration, the Republic's "fears of *res judicata* are baseless." Pet.App. 61a. Therefore, to the extent the shaping of the judgment could lessen the impact on the Republic, the lower courts have done so.

3. The judgment effects finality and gives Plaintiff Merrill Lynch an adequate remedy.

The final two enumerated factors in Rule 19(b) address the effectiveness of a final judgment from the standpoint of the plaintiff and the other litigants. Implicit in the Rule is the understanding that in the absence of a "necessary" or "required" litigant, finality may be imperfect. Therefore, Rule 19 asks whether the finality achievable without the missing litigant is "adequate" and whether dismissal will deprive the plaintiff of an adequate remedy.

Merrill Lynch, the plaintiff, answers unequivocally that the final judgment is adequate, and that it will have no remedy at all if this action is dismissed. Merrill Lynch Br. at 14 and 29. Notwithstanding the

possible future litigation the Republic might threaten, the judgment resolves entitlement to the Account assets as a practical matter. The likelihood that the Republic could prevail against Merrill Lynch in an action to recover the Account assets is so *de minimis* that Merrill Lynch is willing to accept that risk. As this Court stated in *Provident Tradesmens Bank*, there is "no reason . . . to throw away a valid judgment just because it [does] not theoretically settle the whole controversy." 390 U.S. at 116.

International treaty provisions will not undermine the adequacy of the judgment. Never invoked and never mentioned in the litigation until the Solicitor General's Statement of Interest, the application of the treaties is speculative. The Republic never sought the assistance of the United States under the Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995), because it cannot satisfy the conditions precedent to invocation. The Republic must first obtain a judgment in its own courts establishing a right to the assets in which all claimants are heard. It has never undertaken such a procedure, despite extensive stays of the interpleader proceeding. Since the Class of Human Rights Victims, with a clear interest to the assets, are barred from the forfeiture proceeding, *see* Ct.Ap.Op., Pet.App. 10a; 2002 Ct.Ap.Op., Pet.App. 41a; Tr.Ct. FOF/COL, Pet.App. 59a, any forfeiture judgment obtained by the Republic as to the assets would be ineligible for

recognition by a United States court under MLAT. *See* 28 U.S.C. § 2467(C).

Nor has the Republic invoked the United Nations Convention Against Corruption, Oct. 31, 2003, GA Res. 58/4, which the United States ratified in 2006, two years after the judgment in this action. Questions of the Convention's retroactivity aside, the United States complied with its obligations thereunder since the Republic was permitted to participate in "a civil action," *i.e.*, the interpleader action, "to establish title to or ownership of property" allegedly stolen from it. *See* Convention, art. 53(a).

The final judgment is also adequate from the standpoint of the parties to the litigation. Although only one party prevailed – the Class – the interpleader finally resolved the parties' claims *inter se* to the Account assets, and the court of appeals affirmed the judgment on the merits. Though the parties other than the Class are disappointed with the outcome, they had full discovery and a fair opportunity to submit evidence and plead their claims.

4. Other factors support the Rule 19(b) determination.

The Republic's dilatoriness in seeking a judgment as to the Account assets is a factor both lower courts took into account. Both courts noted that the Republic has been aware of the Account assets since 1986 and even obtained a freeze order from a federal court in 1987. The Republic offers no explanation to this

Court why it has vigorously pursued litigation concerning other alleged Marcos assets in this country, but not the Arelma assets. Nor has it explained its unwillingness to participate in the instant interpleader (yet permitting PNB and Arelma to participate) while prosecuting over a dozen other lawsuits in United States courts – and participating in other interpleader actions.

The status of the Class members as adjudicated human rights victims is another factor taken into account by the lower courts. International treaties ratified by the United States require it to provide remedies for compensation to human rights victims. *See* International Covenant on Civil and Political Rights, art. 2(3), *supra*, and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85. The interpleader serves precisely that purpose. The Republic has never compensated the Class members for the abuses they suffered, and has interfered with the Class members' attempts to enforce its judgment. Ct.Ap.Op., Pet.App. 10a; RA-12. Enabling victims of *jus cogens* violations of fundamental human rights to receive compensation for their suffering and loss, as required by international treaty law, could well be characterized as serving a public good and falling within the "public rights" exception to the indispensable party requirements. *See Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (weighing the claim of indispensability in light of the "public rights" exception and the fact that the

interests of the parties claiming to be indispensable had been protected by other parties in the litigation).

5. The Republic's sovereignty is a factor but not the sole or overriding factor.

Although sovereignty is not an enumerated factor in Rule 19(b), the lower courts appropriately considered it. The court of appeals referred to it as a "powerful consideration," but "not the sole consideration." Ct.Ap.Op., Pet.App. 7a. Before this Court, the Republic contends that foreign sovereigns have the absolute power to block all interpleader actions in United States courts involving assets they claim. Pet.Br. at 27 *et seq.* This contention is not supported by the *amicus curiae* brief filed by the Solicitor General, which recognizes the importance of the balancing approach under Rule 19(b) and agrees that proceedings can continue even if a sovereign claimant is absent. U.S. Br. at 21-22. Nor is support for this contention found in the text of the FSIA or Rule 19(b). Indeed, Petitioners fail to cite even one single case supporting the Rule 19(b) dismissal of an interpleader action based solely on the fact that a foreign sovereign has asserted immunity.[20]

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[20] Numerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties, including, *e.g.*, *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 1058 (N.Y. 2003) (ruling that although a tribe protected by sovereign immunity had interests

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The cases involving the immunity of the United States, the 50 states, and Indian tribes cited by the Republic are not analogous to the present situation, because Indian tribes, the 50 states, and the federal government operate within the jurisdiction of the United States and, if a case is dismissed after an assertion of sovereign immunity, other means exist to address and resolve the dispute. For example, in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District,* 276 F.3d 1150, 1162-63 (9th Cir. 2002), which the Republic cites, the court dismissed the claim only after determining that three potential "viable alternative forum[s]" existed – a suit on behalf of the plaintiff brought by the United States, a suit brought on behalf of the plaintiff by the Equal Employment Opportunity Commission, and a suit by the plaintiff in tribal court.

Assertions of sovereignty coupled with indispensability arise in cases involving claims of immunity by the United States, the 50 states, and Indian tribes, and such evaluations are always fact-specific. Some involve claims brought by Native American tribes,

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that would be affected by the litigation, the tribe should not be deemed an indispensable party because that would leave the public with no effective remedy against constitutional violations and other abuses by the executive branch), and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-20 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003) (ruling that although the immune tribes "can claim a legal interest in this lawsuit," the claim could proceed without them because their interest would be represented by another party).

where the United States Government is the nonjoined party. Courts have often allowed such claims to proceed without the United States, and the courts have been particularly influenced by the potential consequence that the lawsuit could not be pursued and thus that the underlying dispute would continue to fester. In *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), for instance, the court of appeals noted that "[m]ore than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations," and that "[i]f we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago." *Id.* Even though proceeding with the suit might well require the defendants to undertake "the burden and expense of defending two lawsuits" (*i.e.*, a second one brought by the United States), the court ruled that "the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations." *Id.* Similarly, in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976), the court allowed an action brought by the tribe against the State of Rhode Island and other defendants to proceed even in the absence of the United States, which could not be sued because of its sovereign immunity.

Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999), relied upon by Petitioners, Pet.Br. at 32, 38, 43, is not to the contrary. There, the court of appeals remanded on the grounds that despite the absence of the tribe, tribal sovereign immunity did not necessarily make the tribe indispensable, and stated that sovereign immunity does "not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases" (citations omitted). Similarly, in *Imperial Appliance Corp. v. Hamilton Manufacturing Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967), the court allowed the action to proceed after determining that joinder was not feasible because there was no alternative forum in which plaintiffs could maintain the action against all interested parties. *See also Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997) (ruling that the United States was not an indispensable party); *Wyandotte Nation v. City of Kansas City, Kansas,* 200 F. Supp. 2d 1279, 1297-98 (D. Kan. 2002) (same); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (holding that the tribe was not an indispensable party); *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001) (same); *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (same); *Dairyland Greyhound Park, Inc. v. McCallum,* 258 Wis.2d 210, 655 N.W.2d 474 (Wis. 2002) (same).

Courts confronted with State assertions of Eleventh Amendment sovereignty coupled with indispensability in interpleader actions have rejected arguments

that actions should be dismissed altogether based on the immunity claim. These decisions emphasize a practical approach to rule 19(b). For example, in *Hudson Savings Bank v. Austin*, 479 F.3d 102 (1st Cir. 2007), the court of appeals addressed the problem raised by a claim of Eleventh Amendment immunity by Massachusetts in an interpleader action where the underlying issue was the relative priority of federal and state tax liens. This appellate court decided that a practical way around the immunity claim could be found by instructing the district court to stay the interpleader with regard to Massachusetts, to adjudicate "the main dispute between the two sovereigns," and then to remand "what was left of the interpleader action to the state court for resolution." *Id.* at 108. Similar outcomes were reached in *GE Capital Mortgage Services, Inc. v. Estate of Lugo*, 319 F. Supp. 2d 127, 134 (D.Mass. 2004) (finding, "after examining the alternatives . . . that 'proceeding to judgment . . . provides the most complete and efficient resolution of the controversy that is possible, with less danger of inconsistency than any other available course of action.'") and *Horizon Bank & Trust Co. v. Flaherty*, 309 F. Supp. 2d 178 (D.Mass. 2004), *appeal dismissed on other grounds*, 391 F.3d 48 (1st Cir. 2004).

When the litigant is a foreign government entitled to sovereign immunity, alternative means to resolve a dispute over assets within the United States do not exist, and a dismissal of the claim would leave the dispute unresolved. The approach urged by the Republic would permit any foreign sovereign to claim an interest in any litigation in the United States

without having to present any evidence whatsoever to support its claim, assert foreign sovereign immunity and indispensability – *again without having to present any evidence to support the claim* – and then completely bar adjudication of the dispute by U.S. courts, *even if the assets in dispute are unquestionably in the United States.* In the present case, the Republic's position would bar the claimants from any forum to pursue their claims *even though a U.S. court has in rem jurisdiction over the disputed assets.*

C. Balancing all factors, the lower courts properly held the Republic was not an indispensable party.

Both of the lower courts followed *Provident Tradesmens Bank* and balanced the pertinent factors separately. In written opinions, each court discussed the factors it considered. Both courts concluded, in equity and good conscience, that the Republic was not an indispensable party.

Petitioners and the United States place complete and undue emphasis on the Republic's foreign government status. Indeed, their analysis exemplifies the "inflexible approach" which the "[r]ule was designed to avoid." *Provident Tradesmens Bank*, 390 U.S. at 107. The fact that it is possible to weigh and balance the factors differently from the way in which the lower courts undertook the task is not a basis to overturn the ruling below. On this record, it cannot be said that the lower courts abused their discretion.

IV. This Case Will Not Adversely Impact United States Foreign Relations.

It is noteworthy that the *amicus curiae* brief filed by the United States makes no broad assertion that the present case will present significant difficulties with regard to any U.S. foreign policy interest or will undermine U.S. relations with the Philippines. The U.S. *amicus* brief focuses on technical issues relating to interpretations of Rule 19 and the application of principles of standing to the present case. Its "Argument" makes only passing reference to the Treaty on Mutual Legal Assistance in Criminal Matters and the UN Convention Against Corruption, which "contemplate cooperation" but have no direct relevance to the present adjudication.

The Republic's claim of a possible adverse impact on its relationship with the United States is overstated.[21] More than a dozen other cases in United

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[21] The Republic's argument that distribution of the assets in the Account to poor Filipinos is an "affront [to Philippine] dignity and may affect our relations with [the U.S.]," Pet.Br. at 48, stands in stark contrast to its position regarding hearings conducted by the U.S. Congress on March 14, 2007 investigating hundreds of "extrajudicial" killings in the Philippines, which have been attributed to the Philippine military under the Arroyo administration. *See* http://foreign.senate.gov/hearings/2007/hrg070314p.html. In an interview on March 11, 2007, the Philippines National Security Adviser, Norberto Gonzales, said "the inquiry was neither an affront to the country's sovereignty nor a breach of courtesy among nations." *See Palace Unfazed by US Hearing on Extrajudicial Killings, Philippine Daily Inquirer,* March 11, 2007, <http://newsinfo.inquirer.net> (and related

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States courts involving both the Republic and the Marcos assets have not adversely affected United States relations with the Philippines. Although Petitioners insinuate a lack of comity on the part of the United States courts, the opposite is true. At the outset of this case, the Republic engaged in forum and judge shopping, asserting its sovereign immunity only after losing its motions to transfer the case or recuse the judge. Although the Republic has known of the existence of the Account at Merrill Lynch since at least 1986, and obtained a federal court freeze order regarding these assets in 1987, *see* Exhibit 23, JA35, the Republic thereafter abandoned its interest in this Account and never pursued any recovery of it in either a Philippine or U.S. court until July 2004 – four days after judgment was rendered for the Class in the lower court. By seeking relief in a Philippine court following entry of the judgment, the Republic hoped to nullify the American judgment.[22] This lethargy does not

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articles on March 15 and 16). Surely a country unfazed by U.S. Congressional hearings tying its leadership to mass killings (resulting in a reduction in foreign aid) cannot be overly sensitive to a judicial interpleader proceeding determining entitlement to assets of a former president (deceased while residing in Hawaii) that have been in the United States since 1972.

[22] The July 15, 2003 decision of the Philippine Supreme Court forfeiting the Swiss bank accounts made no mention of the Arelma funds on deposit with the United States court in Hawaii since the Republic never sought any relief as to those funds. *See* Tr.Ct. FOF/COL, Pet.App. 56a. The Republic's motion, pending in a lower Philippine court, seeks to reopen the Philippine Supreme Court decision which the latter Court had expressly declared final and executory.

comport with its grand assertions that the Account is "a matter of the greatest urgency," a "preeminent responsibility of the Philippine government," affecting its "vital national interests," and endangering its ability to "combat official corruption." Pet.Br. at 3 and 49.

The Republic's current position contradicts the official position it presented to the court of appeals in 1987, where it argued that the U.S. courts should "allow Plaintiffs . . . to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court." *Amicus Curiae* Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, RA-1. It also stated

> without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts; and in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. . . .

Id. at 11 (emphasis in original).

The U.S. courts acted in conformity with that request, and, after contentious adjudication, the

decision below provides the opportunity to provide modest compensation to the Victims who have suffered so much, and their heirs. This distribution will vindicate transcendent values shared by the United States, the Philippines, and indeed the entire world community. *See Sosa v. Alvarez-Machain*, 542 U.S. 694, 731-32 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)); and *Sosa, supra*, at 728 (recognizing that the Torture Victim Protections Act of 1991, 106 Stat. 73, has provided "authority that 'establish[es] and unambiguous and modern basis for' federal claims of torture and extrajudicial killing").

It is also clear that the international community has reached agreement on the substantive principle that torture and extrajudicial murder by government officials are unlawful and "procedural agreement that universal jurisdiction exists to prosecute" those who commit such acts and that providing "universal tort jurisdiction" "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring). It would be a cruel irony if our courts, after acknowledging the legitimacy of such claims, adopted a rule on indispensability that effectively forecloses the ability of victims of human rights abuses ever to collect their judgments. In *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539 (9th

Cir. 1996), the court of appeals quoted from the Republic's 1987 *amicus* brief, noting that "the Republic's own subsequent actions" were interfering with the efforts of the Human Rights Victims to collect their judgment, *id.* at 547, and then explained that the Republic had "stated that [the Class of Victims] should be permitted to seek damages from *whatever assets the Estate [of Marcos] could establish as its own.*" *Id.* (emphasis added). Allowing litigants to collect on their judgment against the assets of the tortfeasor is obviously an essential element to the vindication of these principles.

The objections raised by the Swiss Federation in its 2007 diplomatic note, *see* Pet. Reply App. 1a, are contrary to a diplomatic note Switzerland sent to the United States in 1994. In the 1994 note the Federation claimed the primacy of Swiss courts to make the initial adjudication of entitlement to Marcos assets located in Switzerland since its courts possessed *in rem* jurisdiction. Now Switzerland contends United States courts have no power to adjudicate entitlement to Marcos assets even though a United States court possesses *in rem* jurisdiction.[23] Counsel for the

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[23] Switzerland also claims that the Account in the United States was subject to Switzerland's jurisdiction because the Swiss had confiscated the two Arelma share certificates and transferred them to the Republic. Switzerland's assertion of jurisdiction over the Arelma assets in the United States is a frontal attack on this Court's decision in *Dole*, 538 U.S. at 468, which held that a shareholder does not own or control the assets of the corporation.

Human Rights Victims requested the Swiss Embassy to explain this contradiction but it failed to do so. *See* RA-24.

The Swiss Federation's position is also undermined by the decisions of its own Supreme Court which permitted the return to the Philippines of Marcos funds located in Switzerland. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997), JA64. Return of the funds was conditioned explicitly on the Republic's compensation of Filipino human rights victims, citing the Class' judgment. *Id.* at 84-86. As the court of appeals pointed out, the human rights victims have never been compensated. *See* Ct.Ap.Op., Pet.App. 9a-10a.

Although the present case involves a foreign government and international issues, it is essentially a case involving judicial procedure.

CONCLUSION

Both the irony and injustice in this case spring from a foreign sovereign's campaign to prevent its most abused and vulnerable citizens from recovering compensation on their judgment, rendered in a United States court, for *jus cogens* violations of human rights perpetrated by a former president of that sovereign. Petitioners advocate for a rule that would totally prevent courts from adjudicating disputes over assets, because they assert the right to block any

such adjudication merely by claiming the disputed assets, without having to present any evidence to substantiate their claim. Once Petitioners' position is understood, it becomes clear that it must be rejected.

For the reasons set forth above, this Court should dismiss the appeal of the nonparty Republic for lack of power to appeal, and dismiss the appeal of Arelma and PNB for mootness or lack of appellate standing. In the alternative, this Court should affirm the decision below that the Republic was not an indispensable party under Rule 19(b).

Respectfully submitted,

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Appendix A

[Filed in the Ninth Circuit in *Hilao v. Ferdinand Marcos et al*, No. 15039 (later MDL 840), 1987]

AMICUS BRIEF OF THE REPUBLIC OF THE PHILIPPINES

I.
INTRODUCTION

The Republic of the Philippines strongly urges this Honorable Court to reverse the July 18, 1986 decision of the U.S. District Court for the District of Hawaii in the cases of *Hilao, et al. v. Marcos, et al.*, Docket No. 86-2449 (hereafter "Hilao"), and *Trajano, et al. v. Marcos, et al.*, Docket No. 86-2448, 86-15039 (hereafter "Trajano"), and to allow the Plaintiffs in those two cases to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court.

The District Judge ruled that these cases are "non-justiciable under the act of the state doctrine" because they "involve judicial review of the acts of the duly recognized head of a foreign sovereign committed under authority of law." Slip opinions, *Hilao* at 14, *Trajano* at 16. This conclusion characterizes the act of state doctrine in terms that are too broad and applies the doctrine incorrectly to these facts.

II.
THE DISTRICT COURT CHARACTERIZED THE ACT OF STATE DOCTRINE TOO BROADLY AND IGNORED THE RESPONSIBILITY OF COURTS TO DECIDE CASES INVOLVING AGREED PRINCIPLES OF INTERNATIONAL LAW.

The act of state doctrine is "compelled by neither international law nor the [U.S.] Constitution," but it has continued to play a significant role in the courts of the United States and some other countries because of "its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964). It does *not* foreclose judicial scrutiny of *all* acts of foreign governments, but only those on which no "agreed principle" exists or those that involve aspects of international law that "touch much more sharply on national nerves than do others." *Id.* at 428. The District Court apparently misinterpreted this doctrine by phrasing it as a *per se* rule that applies automatically. It should instead have carefully balanced the interests involved to evaluate whether it is appropriate to apply this doctrine to these causes.

If it had undertaken such a balancing approach, the District Court would certainly have concluded that the aspects of international law raised by these cases – whether a former head of state can commit illegal acts of torture and murder – is one on which an "agreed principle" exists. *See, e.g., Filartiga v.*

Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) ("There is at present no dissent from the view that the guaranties [of international human rights and fundamental freedoms] include, at a base minimum, the right to be free from torture").

Furthermore, this question of the legitimacy of torture and arbitrary murder of citizens by governmental officials acting under color of law is not one that touches "national nerves" sharply.

The instant case indeed raises the issue of the State responsibility of the Philippine government not to its alien residents but to its very own nationals to protect themselves from peril to their lives and limbs and their property. Surely, American courts should not shield a former head of State of a foreign government from imputations of committing acts of torture against its own nationals under the guise of the act of state doctrine originally enunciated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 43 L.Ed. 456 (1897), and reiterated in *Detjen v. Central Leather Co.*, 1248 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *Ricaud v. American Metal Co. Ltd.*, 246 U.S. 304; 38 S.Ct. 312, 62 L.Ed. 733 (1918); *Banco Nacional de Cuba v. Sabatino*, *supra*.

In all of the aforecited cases, the Courts had stressed on the political considerations that could have affected the conduct of foreign relations of the government of the United States of America, i.e., offense to the foreign state. In the present case, the Philippine government would not in the very least be

offended if judicial inquiry is made on the participation of its former head of State in the commission of acts herein complained of.

This Honorable Court should not shy away from enforcing the international recognition of the essential rights of man to be free from harm to life and limb against higher authorities of his State.

Indeed, all nations have agreed repeatedly in recent years that torture and arbitrary murder by government officials are violations of international law. The Republic of the Philippines was, for instance, a sponsor of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture, which states in Article 2:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

U.N. General Assembly Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1976). The Republic of the Philippines also supported U.N. General Assembly Resolutions 35/170 and 35/178 on the "Code of Conduct for Law Enforcement Officials" and on "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." The Republic of the Philippines has signed the 1966 International Covenant

on Civil and Political Rights, which states in Article 7 that "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." Perhaps most significantly, the 1973 Constitution of the Republic of the Philippines specifically condemns torture in Article IV, Section 20:

> Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. *No force, violence, threat intimidation, or any other means which violates the free will shall be used against him.* (Emphasis added.)

The Republic of the Philippines has, therefore, joined forces with the other nations of the world to condemn torture and other arbitrary use of force against individuals. The United States has also been at the forefront of this movement. The U.S. State Department has repeated this commitment forcefully in recent years:

> Human rights is at the core of American foreign policy because it is central to America's conception of itself. This nation did not 'develop.' It was created in order to make real a specific political vision. It follows that 'human rights' is not something added on to our foreign policy, but its ultimate purpose: the preservation and promotion of liberty in the world.

U.S. State Department, *Country Reports on Human Rights Practices for 1983* at 1478 (Report submitted

to the House Foreign Affairs Committee and the Senate Foreign Relations Committee, 89th Cong., 2d Sess., Feb. 1984) (emphasis in original).

Because all nations have condemned torture and murder under color of law and the United States and the Philippines have worked together to establish the prohibition of torture and murder by governments of their citizens as a peremptory norm of international law, no judge need shy away from examining allegations that these clear principles of law have been violated. In these cases, there are disputes about what facts occurred, but there is no dispute about what standard of international law applies. The act of state doctrine exists in the United States to prevent judges from issuing opinions that may interfere with the foreign policy interests of the United States. It does not prevent judges from hearing complaints that allege that clear standards of international law – agreed upon by the United States and all other concerned nations – have been violated. The act of state doctrine should not, therefore, stand in the way of these cases being litigated in U.S. Courts.

III.
EVEN IF THE DISTRICT COURT'S CHARACTERIZATION OF THE ACT OF STATE DOCTRINE WERE CORRECT, THE APPLICATIN [sic] OF THE DOCTRINE TO THE FACTS OF THESE CASES IS INCORRECT BECAUSE THE TORTURE AND MURDER ALLEGED – ALTHOUGH COMMITTED UNDER COLOR OF LAW – WERE ILLEGAL.

As mentioned above, Article IV, Section 20 of the 1973 Philippine Constitution specifically prohibits torture or other use of force by government officials against Philippine citizens. The distinction between lawful and unlawful acts was clearly understood by the drafters of the 1973 Constitution and they took care not to immunize illegal governmental actions. (*See* Article VII, Section 15, of the 1973 Philippine Constitution, which immunizes ex-Presidents from suit only for "official acts" undertaken during their tenure.)

Besides, the immunity from suit invoked by defendant Ferdinand Marcos is not all absolute, but subject to the constitutional provision on accountability of public officers (1973 Constitution, Article XII, Sec. 1, *et seq.*), and other statutes penalizing acts of public officers in abuse of authority (Revised Penal Code, Article 203, *et seq.*) and Anti Graft and Corrupt Practices Act (Rep. Act No. 3019).

During the 1981 debates over amending the Constitution, it was said:

> [T]he government or its officials may not validly claim state immunity for acts they committed against a private party in violation of an existing law. They should be held responsible, for as the state can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful . . . is not the word or deed of the state but is the mere wrong and trespass of those persons who falsely speak and act in its name.

Deliberations at the Batasang Pambansa, Sinco, p. 33 (February 1981).

It is axiomatic in democratic governments that:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government from the highest to the lowest are creatures of that law and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1982). The District Court thus mischaracterized the acts alleged to have occurred in this case when it concluded that they were committed "under *authority* of law." Slip opinions, *Hilao* at 14, *Trajano* at 16 (emphasis added). The complaints allege that these acts were committed under *color* of law, but no *authority* of law existed to justify the torture or murder of Philippine citizens by any official of the Philippine government.

This distinction was explicitly recognized by the U.S. Court of Appeals for the Fifth Circuit in a case involving the former head of state of Venezuela who

had sought refuge in the United States, but was subsequently accused of having committed financial improprieties while he was in office. *Jimenez v. Artisteguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963), *reh'ng denied*, 374 U.S. 858 (1963). *Jimenez* presented an argument similar to that made by Mr. Marcos, contending that he was charged with

> acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456, [the] was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality.

Id. at 557 (emphasis added). The court rejected this claim, stating that the acts Jimenez was alleged to have committed

> constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an 'Act of State.'

Id. at 558 (emphasis added). Ferdinand Marcos is accused of committing acts of violence similar in severity to the rape analogy used by the U.S. Court of Appeals for the Fifth Circuit. The same legal principles that applied to the deposed dictator Jimenez surely should also apply to ex-President Marcos. For

the same reasons that were persuasive to the court in *Jimenez*, Ferdinand Marcos should not be protected from civil liability by the act of state doctrine for acts like torture and murder.

IV.
CONCLUSION

The Government of the Republic of the Philippines is not directly involved in the *Hilao* and *Trajano* cases now before this Honorable Court. They have been brought by private Philippine citizens who allege that they – or their loved ones – have been physically mistreated by Ferdinand Marcos and his associates during the period Mr. Marcos was President of the Philippines. They brought their action in the U.S. District Court for Hawaii, because that is where Mr. Marcos has taken refuge. Service was perfected upon Mr. Marcos and jurisdiction has been established under the relevant U.S. statute (28 U.S.C. § 1350). Nonetheless, the U.S. District Court has blocked this litigation, concluding that the act of state doctrine prevents a U.S. court from adjudicating this matter.

The Government of the Republic of the Philippines respectfully urges this Honorable Appellate Court to reverse the District Court and allow Plaintiffs to present evidence in support of their claims. Because the international law principles are clear and agreed upon by all nations, this judicial action does not have the capacity of disrupting foreign

relations between the concerned countries. The Government of the Republic of the Philippines can state without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts; and, in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. *See* Opinion No. 34, S. 1986, Ministry of Justice, Republic of the Philippines, dated April 23, 1986, attached hereto as Exhibit A. The Philippine Government now respectfully requests this Honorable Court to allow the present suits to proceed to trial.

Respectfully submitted,

Makati, Metro Manila for Manila, Philippines.

NEPTALI A. GOZALES
Minister of Justice

Appendix B

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-ninth session

concerning

Communication No. 1320/2004**

Submitted by:	Mariano Pimentel et al. (represented by counsel, Mr. Robert Swift)
Alleged victim:	The author
State party	The Philippines
Date of communication:	11 October 2004 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Having concluded its consideration of communication No. 1320/2004, submitted to the Human Rights

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** The Following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke, Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

Committee on behalf of Mariano Pimentel et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Meeting on 19 March 2007

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mariano Pimentel, Ruben Resus and Hilda Narcisco, all Philippine nationals. The first author resides in Honolulu, Hawaii, and the others in the Philippines. They claim to be victims of violations by the Republic of the Philippines of their rights under article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant. The Covenant and the Optional Protocol entered into force for the State party on 23 January 1987 and 22 November 1989, respectively. The authors are represented by counsel; Mr. Robert Swift of Philadelphia, Pennsylvania.

Factual Background

2.1 The authors claim to be members of a class of 9,539 Philippine nationals who obtained a final judgment in the United States for compensation against the estate of the late Ferdinand E. Marcos ("the Marcos estate") for having been subjected to torture during the regime of President Marcos.[1] Ferdinand E. Marcos was residing in Hawaii at the time.

2.2 In September 1972, the first author was arrested by order of President Marcos two weeks after the declaration of martial law in the Philippines. Over the next six years, he was detained for a total of four years in several detention centres, without ever being charged. Upon return from his final period in detention, he was kidnapped by solders [sic], who

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[1] United States District Court in Hawaii, Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840 [The authors' names are not mentioned in the judgment. There is a list of around 137 randomly selected "class claims" and the compensatory damages awarded to them (ranging from US$ 10,000 to US$ 185,000) is specified. Judgment for compensatory damages was also awarded to victims in three of the remaining plaintiff subclasses "of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured summarily executed/ disappeared and are presumed dead, while in the custody of the Philippine military or para-military groups, in the aggregate of US$251,819,811.00, US$409,191,760.00 and US$94,910,640.00 to be divided pro-rata. Judgment for US$ 1,197,227,417.90 exemplary damages was also awarded to be divided pro rata among all members of the plaintiff class.]

beat him with rifles, broke his teeth, his arm and leg, and dislocated his ribs. He was buried up to his neck in a remote sugar cane field and abandoned, but was subsequently rescued.

2.3 In 1974, the second author's son, A.S., was arrested by order of President Marcos and taken into military custody. He was tortured during interrogation and kept in detention, without ever being charged. He disappeared in 1977. In March 1983, the third author was also arrested by order of President Marcos. She was tortured and gang-raped during her interrogation. She was never charged with nor convicted of any offense.

2.4 In April 1986, the authors, together with other class members, brought an action against the Marcos estate. On 3 February 1995, a jury at the United States District Court in Hawaii awarded a total of US$ 1,964,005,859.90 to the 9,539 victims (or their heirs) of torture, summary execution and disappearance. The jurors found a consistent pattern and practice of human rights violations in the Philippines during the regime of President Marcos from 1972-1986. Where individuals were randomly selected, part of the amount of the judgment is divided per claimant. Individuals, who were not randomly selected but are part of the class, including the authors, will receive part of the award which was made to three

subclasses.[2] However, the amounts were not divided per claimant and it is only after collection (in whole or in part) of the judgment amount that the United States District Court of Hawaii will allocate amounts to each claimant. On 17 December 1996, the United States Court of Appeal for the Ninth Circuit affirmed the judgment.[3]

2.5 On 20 May 1997, five class members, including the third author, filed a complaint against the Marcos estate, in the Regional Trial Court of Makati City, Philippines, with a view to obtaining enforcement of the United States judgment. The defendants counter filed a motion to dismiss, claiming that the PHP 400 (US$ 7.20) paid by each plaintiff was insufficient as the filing fee. On 9 September 1998, the Regional Trial Court dismissed the complaint, holding that the complainants had failed to pay the filing fee of PHP 472 million (US$ 8.4 million), calculated on the total amount in dispute (US$ 2.2 billion). On 10 November 1998, the authors filed a motion for reconsideration before the same Court, which was denied on 28 July 1999.

2.6 On 4 August 1999, the five class members filed a motion with the Philippine Supreme Court, on their

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[2] The subclasses relate to those victims that had been (1) tortured, (2) summarily executed and (3) disappeared and are presumed dead.

[3] United States Court of Appeals for the Ninth Circuit, Hilao v. Estate of Marcos, 103 F.3d 767.

own behalf and on behalf of the class, seeking a determination that the filing fee was PHP 400 rather than PHP 472 million. By the time of submission of the communication to the Committee (11 October 2004), the Supreme Court had not acted on this motion, despite a motion for early resolution filed by the petitioners on 8 December 2003. (see para. 4 below for an update).

2.7 According to the authors, since the five class members filed their motion with the Philippine Supreme Court, the same Court entered judgement for the State party against the Marcos Estate in a forfeiture action and directed enforcement of that judgement for over US$ 650 million, even though that appeal was filed over two years after the authors' own petition.

The Complaint

3. The authors claim that their proceedings in the Philippines on the enforcement of the US judgement have been unreasonably prolonged and that the exorbitant filing fee amounts to a *de facto* denial of their right to an effective remedy to obtain compensation for their injuries, under article 2 of the Covenant. They argue that they are not required to exhaust domestic remedies, as the proceedings before the Philippine courts have been unreasonably prolonged. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant.

The State party's submission on admissibility and merits

4. On 12 May 2005, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It submits that, on 14 April 2005, the Supreme Court handed down its decision in *Mijares et al. v. Hon. Ranada et al.*, affirming the authors' claim that they should pay a filing fee of PHP 410 rather than PHP 472 million with respect to their complaint to enforce the judgment of the United States District Court in Hawaii. The State party denies that the authors were not afforded an effective remedy.

The authors' comments on the State party's submission

5.1 On 12 January 2006, the authors submit that there has been no satisfactory resolution of their claims. They confirm that, on 14 April 2005, the Supreme Court decided in their favour with respect to the filing fee. However, despite the Supreme Court's view that there be a speedy resolution to their claim by the trial court, this court has not yet decided on the enforceability of the decision of the United States District Court of Hawaii.

5.2 In addition, the authors argue that an appeal in a parallel case, which is one year older than the

appeal in the current case has been pending for over seven years in the Philippine Supreme Court.[4]

Additional comments by the parties

6. On June 1, 2006, the State party submitted that, following the Supreme Court decision on the filing fee, the case was reinstated before the trial court. It adds that the authors of the current case are unrelated to the case referred to in paragraph 5.2.

7.1 On 15 June and 4 July 2006, in response to a request for clarification from the Secretariat regarding the authors' status as "victim[s]" for the purposes of article 1 of the Optional Protocol, the authors stated that a class action in the United States may be brought by any member of the class on behalf of a defined group, in this case, 9,539 victims of torture, summary execution and disappearance. All class members have standing in a class action once it is certified by a court and all have the right to share in a final judgement. A court is free to designate particular class members as "class representatives" for purposes of prosecuting the litigation, but the "class representative" has no more standing on his claim than any other individual class members. Thus, the

[4] This case relates to Imelda M. Manotoc v. Court of Appeals, which involves an interlocutory appeal from the lower court finding there was sufficient service on Imee Marcos-Manotoc, the daughter of Ferdinand E. Marcos, in an action to enforce a United States judgment against her for the torture and murder of a man.

use of different "class representatives" for the same class in lawsuits filed in the US and the Philippines has no bearing on the authors' standing. The Philippine rule on class actions is derived from and based on the United States rule.

7.2 According to the authors, in a class action filed in the United States, it is not common to file a list of all class members. In this case, where the public record could be inspected by the Philippine Ministry, which might act in reprisal against the living torture victims, caution was exercised. The authors, provide evidence to prove that they are members of the U.S. class action: an excerpt from Ms. Narcisco's testimony at the trial on liability in the United States; an excerpt from Mr. Pimentel's deposition in 2002 in the United States, and a United States judgement in which he was certified as a class representative in a subsequent case; and a claim form as required by the court with respect to M. Resus. The authors also confirm that there has been no action taken for the enforcement of the judgement.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or nor [sic] it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the claim relating to the enforcement of the United States District Court of Hawaii's judgement is currently pending before the State party's Regional Trial Court. Since the last hearing on the filing issue relating to this case, on 15 April 2005, in which the Supreme Court found in favour of the authors, the issue of the enforcement of the judgement has been reinstated before the Regional Trial Court. For this reason, and bearing in mind that the complaint relates to a civil claim for compensation, albeit for torture, the Committee cannot conclude that the proceedings have been so unreasonably prolonged that the delay would exempt the authors from exhausting them. Accordingly, the Committee finds that this claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.3 The Committee observes that since the authors brought their action before the Regional Trial Court in 1997, the same Court and the Supreme Court considered the issue of the required filing fee arising from the authors claim on three subsequent occasions (9 September 1998, 28 July 1999 and 15 April 2005) and over a period of eight years before reaching a conclusion in favour of the authors. The Committee considers that the length of time taken to resolve this issue raises an admissible issue under article 14, paragraph 1, as well as article 2, paragraph 3, and should be considered on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the length of the proceedings relating to the issue of the filing fee, the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness.[5] It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of

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[5] *Perterer v. Austria, Communication No.1015/2001,* Views adopted on 20 July 2004, para. 10.7.

article 14, paragraph 1, read in conjunction with article 2, paragraph 3, as it relates to the proceedings on the amount of the filing fee.

11. The Committee is of the view that the authors are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to prove an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views

Appendix C

[Letterhead of Kohn, Swift & Graf, P.C.]

December 11, 2007

Ambassador Urs Ziswiler
Embassy of Switzerland
2900 Cathedral Ave. NW
Washington, DC 20008

Re: Republic of the Philippines v. Mariano J. Pimentel, United States Supreme Court, No. 06-1204

Dear Ambassador Ziswiler:

I wish to bring to your attention a matter of some urgency on behalf of the 9,539 Filipino human rights victims I represent in the above matter. On April 5, 2007 the Embassy of Switzerland submitted a diplomatic note to the United States Department of State intended for submission to the United States Supreme Court in the above matter.[1] Since the Embassy may participate as *amicus* in the merits briefing, I wish to bring to your attention inconsistencies in the position taken by the Embassy.

In the 1990's the victims sought to enjoin transfer of Marcos assets located in two Swiss banks,

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[1] Regrettably, the submission of the note to the Court occurred well after the submission of the human rights victims' Opposition Brief, thus precluding any response by counsel for the victims. This appears to be a practice of the Embassy since it has recurred several times in different courts as the Embassy has regularly opposed the victims.

Swiss Bank Corporation and Credit Suisse, which had branches in the United States. The accounts at issue, however, were located at the banks' branches in Switzerland. Your Embassy sent a diplomatic note dated June 7, 1994 to the State Department asserting that "[u]nder international law, therefore, the United States courts lack jurisdiction to assert control over this property held in Switzerland." Your Embassy claimed that, initially, only Swiss courts could adjudicate ownership of these assets. Ultimately the injunction entered by the United States courts was not applied to the banks' branches outside the United States.

The above appeal involves a securities trading account at Merrill Lynch in New York which was established for Ferdinand E. Marcos in 1972 by a Swiss banker, Jean Louis Sunier, using a Panamanian corporation named "Arelma." The assets in this account have been in the United States for 35 years. In September 2000, at my request, Merrill Lynch deposited the assets from the Merrill Lynch account with the United States court in Hawaii and filed an interpleader action naming various parties with potential claims to the assets as defendants, including the Republic of the Philippines. The Republic voluntarily chose not to participate and was dismissed therefrom. The United States court found, after a full trial on the merits, that the victims were entitled to the assets in partial satisfaction of their 1995 judgment against the Estate of Ferdinand E. Marcos. Evidence adduced at the trial included the

testimony of Mr. Sunier and opinions of the Swiss Supreme Court finding that Arelma was a Marcos *alter ego*.

In your diplomatic note of April 5, 2007, you assert that United States courts do not have authority to determine legal entitlement to the assets. Yet this is directly contrary to the position the Embassy asserted in 1994 when it claimed the primacy of Swiss courts to make the initial adjudication of entitlement to Marcos assets located in Switzerland.

Switzerland's only other connection to this appeal is that Mr. Sunier retained the two "blank" Arelma stock certificates until these were confiscated from him in 1997. Switzerland gave these stock certificates to the Republic of the Philippines even though there was absolutely no evidence that Arelma had ever been owned by the Republic or was a Republic asset. Rather, it appears the transfer of the stock certificates was intended to permit the Republic to transfer the assets at Merrill Lynch outside the United States. Neither the human rights victims nor the United States courts interfered in any way in the questionable transfer of the certificates.

Your diplomatic note of April 5, 2007 fails to mention other pertinent matters such as:

- The duty of the United States under international treaties, to which Switzerland and the Republic are also signatories, to provide a forum for claims by human rights victims.

- The refusal of Swiss courts to honor letters rogatory requests of the United States court for documents that the human rights victims needed to prosecute their case against the Marcos Estate.

- Switzerland's failure to act on the decade-old ruling of its Supreme Court that compensation should be paid by the Republic to the victims.

Accordingly, I would appreciate you explaining in a letter to me the seeming inconsistent positions taken by your Embassy. In particular, please explain why Swiss courts have the right to adjudicate entitlement to assets located in Switzerland but United States courts do not have the similar right for assets located in the United States. While I have no desire to embarrass the Embassy before the United States Supreme Court, the Embassy's voluntary advocacy in opposing human rights victims may necessitate doing so, including placing this letter and your Embassy's 1994 diplomatic note into the record.

Respectfully yours,

Robert A. Swift

RAS:yr
Cc: US State Dept., Office of the Legal Advisor US Dept. of Justice, Office of the Solicitor General

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Nos. 06-1039 & 06-1204

FILED

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In The
Supreme Court of the United States

ESTATE OF ROGER ROXAS, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent Mariano Pimentel and the Class of 9,539 Filipino human rights victims submit this Supplemental Opposition Brief pursuant to Supreme Court Rule 15.8 to respond to the Statement of Interest of the Solicitor General and to bring new authority to the attention of the Court. The Solicitor General opines that United States courts should abdicate jurisdiction over assets in the United States in virtually all cases when a foreign sovereign asserts a claim to those assets and also claims sovereign immunity. Because this position is (1) contrary to Rule 19(b) and (2) unsupported by any precedent in our jurisprudence, and because (3) the opinion of the court of appeals in this case followed directly the roadmap established by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968), and is not contrary to the holdings of any other Circuit, this Court should deny certiorari.

REASONS FOR DENYING THE PETITION

I. THE DISCRETION COMMITTED TO THE LOWER COURTS BY RULE 19(b) IS NOT ABUSED SIMPLY BECAUSE THE SOLICITOR GENERAL'S ANALYSIS OF CERTAIN FACTORS DIFFERS FROM THE LOWER COURTS' THOUGHTFUL AND THOROUGH ANALYSIS

Rule 19(b) commits to the lower court's "equity and good conscience" the decision whether a party is

indispensable to the litigation. This is the broadest standard of discretion accorded a lower court by the Federal Rules of Civil Procedure. So long as the lower court considered the relevant criteria and balanced the equities – which occurred multiple times by 27 jurists during the history of this litigation – its decision should not be overturned by a reweighing of the equities. Indeed, the Solicitor General's undue emphasis on one party's foreign government status "exemplifies" the "inflexible approach" "that the Rule was designed to avoid." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968).

Read as a whole, the Solicitor General simply quarrels with the court of appeal's analysis of the Rule 19(b) criteria, and makes no claim that the court failed to consider and balance all factors. That the Solicitor General finds the extent of prejudice to the missing party greater, or places less emphasis on the lack of an alternative forum or prejudice to the Class, or discounts the impact to Merrill Lynch from dismissal of the interpleader, or speculates that a United States court might enforce a future foreign judgment contrary to an earlier domestic court judgment, or approves the meddling of a foreign sovereign in the work of the courts, provides no basis to overturn the lowers court's thoughtful and thorough analysis. Nor does it approach the heavier showing required after completion of trial to overturn a Rule 19(b) ruling:

> [The] interest in preserving a fully litigated judgment should be overborne only by rather

> greater opposing considerations than would be required at an earlier stage . . .

Provident Bank & Trust Co. v. Patterson, *supra*, 390 U.S. at 112. Rule 19(b)'s criteria are not exclusive and there are other factors the Solicitor General politely overlooks. The Solicitor General's analysis fails to mention: the Republic's lack of comity and its absence of respect for the United States courts it has heavily utilized to recover Marcos assets, the Republic's own responsibility for its strategic choice to assert sovereign immunity,[1] or the legal obligations the United States owes human rights victims to provide a forum for their claims pursuant to international treaties to which it is a party. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress

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[1] As the lower court found (ROP 58a-59a):

> The Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets. "An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him." *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985). The Republic and PCGG must accept "the disadvantages as well as the advantages that flow from" their "strategic election." *Citibank International v. Collier Traino Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987).

and has an enforceable right to fair and adequate compensation . . . ").

II. THE SOLICITOR GENERAL'S APPROACH WOULD EMASCULATE THE ARTICLE III DUTY OF U.S. COURTS TO ADJUDICATE ENTITLEMENT TO ASSETS LONG HELD IN THE UNITED STATES

The Solicitor General urges that if a foreign sovereign claims assets located on American soil and also asserts sovereign immunity, United States courts must abdicate their constitutional duty to adjudicate title to the assets in virtually all cases and surrender their jurisdiction to a foreign court. In this case, the lower court held that it possessed *in rem* jurisdiction pursuant to 28 U.S.C. §1655 over the assets, in addition to interpleader jurisdiction.[2] ROP 50a. The lower court's assertion of *in rem* jurisdiction was not challenged on appeal or in this Court. This Court has never lowered the flag of American court jurisdiction over *in rem* actions. *See, e.g., Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (state sovereign immunity not a bar to bankruptcy jurisdiction since bankruptcy is similar to an *in rem* action). Applying the reasoning of *Katz*, interpleader

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[2] The United States, at page 9 n.3 of its brief, incorrectly attempts to distinguish this case from other Supreme Court precedent on the ground there was *in rem* jurisdiction over the assets at issue in the other cases but not the instant case.

jurisdiction involves adjudication of entitlement to a *res* and a discharge decree.

The Rule 19(b) issue for which the Solicitor General advocates certiorari is *sui generis*. Never before has a foreign sovereign asserted its immunity to preclude, under Rule 19(b)'s indispensability criteria, a federal court from adjudicating entitlement to assets over which a United States court has both interpleader and *in rem* jurisdiction. Moreover, this action does not involve transitory assets located in the United States for a short time. The assets at issue have been on deposit in the United States for over three decades and in the custody of a federal court for seven years.

Although the Solicitor General asserts that the decision of the lower court conflicts with Rule 19(b) precedent in this Court and other circuits, it fails to cite a single case involving a foreign sovereign. The cases cited involve American political entities or Indian tribes, and in each case there were alternative methods of resolving the dispute within the United States. For example, in the case of Indian tribes, Congress could legislate a solution to the disputes. By contrast, there is no political or litigation alternative to the instant interpleader action.

The Solicitor General's position raises a more troubling issue. If a foreign sovereign can oust U.S. courts of Article III jurisdiction by simply claiming – without proof – assets located in the United States, this power could be asserted and abused by regimes hostile to the United States. Such a doctrine would

eviscerate the proper role of the courts to adjudicate disputes regarding assets in the United States.

III. THIS COURT SHOULD RESIST MANIPULATION OF COURT PROCEDURES BY FOREIGN GOVERNMENTS

Although the Republic of the Philippines has known of the existence of the Arelma account at Merrill Lynch since at least 1986 (when it had a federal court freeze the account), the Republic never sought judicial relief in the Philippines or in the United States as to that account until July 2004 – four days after judgment was rendered for Pimentel and the Class in the lower court. By seeking relief in a Philippine court, the Republic hoped to nullify the American judgment.[3] The Republic participated in the lower court proceedings in this case indirectly through other parties – Philippine National Bank and Arelma – both of which it controlled and paid legal fees for.[4] Those parties were proxies for the Republic,

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[3] The July 15, 2003 decision of the Philippine Supreme Court forfeiting the Swiss bank accounts made no mention of the Arelma funds on deposit with the United States court in Hawaii since the Republic never sought any relief as to those funds. *See* ROP 56a. The Republic's motion, pending in a lower Philippine court, seeks to reopen the Philippine Supreme Court decision which the latter Court had expressly declared final and executory.

[4] The Republic of the Philippines owns 16% of the outstanding stock of Philippine National Bank ("PNB") and elects 4 of its 11 directors. Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf

(Continued on following page)

claimed the assets, and participated in every phase of the litigation. The inescapable conclusion is that when these parties lost in the lower court, nullification was the only alternative.

The Republic has utilized American courts extensively for the recovery of Marcos assets. Since 1986, it filed, or was party in, over a dozen legal proceedings involving alleged Marcos assets, including an interpleader proceeding. *See Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). It never once asserted its sovereign immunity. The assertion of sovereign immunity now is simply an attempt to manipulate this Court. Should the Republic eventually obtain a judgment of forfeiture as to the assets of Arelma in Philippine courts, it may fully satisfy that judgment from the substantial Marcos assets still under sequestration in the Philippines.

The Republic never sought the assistance of the United States under the Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995) – and never mentioned the Treaty in lower court proceedings. Because private parties have no standing in a forfeiture proceeding in the Philippines, its citation now by the Solicitor General is a red herring. *See* ROP 41a. Thus, any forfeiture judgment obtained by the Republic as to the assets would

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of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.*

not be eligible for recognition by a United States court under MLAT since Pimentel and the Class, with an interest in the assets, are barred from the proceeding. *See* 28 U.S.C. §2467(C); ROP 59a. Indeed, the Republic never sought to join Pimentel and the Class to the July 2004 forfeiture proceeding.

Indicative of the Republic's motives in this action is the recent decision by the United Nations Human Rights Committee ("HRC") finding that the Republic violated the rights of Pimentel and the Class under international law. *See Pimentel v. The Philippines*, No. 1320/2004 (Mar. 19, 2007).[5] The HRC found a violation of the United Nations Optional Protocol to the Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985) by virtue of the Philippine court's dismissal of an action in Philippine courts to enforce the Class's 1995 United States judgment against the Marcos Estate for failure to pay a filing fee of $8.4 million, and the subsequent delay of 8 years and 3 months in overturning that decision.

> The Committee is of the view that the authors [the Class] are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective

[5] The decision was not communicated to counsel for Pimentel until after submission of Pimentel's initial Opposition Brief to this Court.

> remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgment in the State party.

Id. at pp. 7-8.

The Republic's current position is diametrically opposite to its official position at the beginning of this human rights litigation, when the Republic represented to the court of appeals in an *amicus curiae* brief that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and that "foreign relations with the United States will **not** be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (quoting from the Republic's *amicus curiae* brief; emphasis in the original brief).

The diplomatic note of the Swiss Federation which objected to the underlying judgment in favor of Pimentel and the Class is no less manipulative. Switzerland had *in rem* jurisdiction over the Arelma share certificates which it transferred to the Republic. The United States courts never interfered in any way with the share certificates or adjudicated entitlement to them. However, Switzerland never had control or jurisdiction over the assets in the Arelma account at Merrill Lynch which, since the account was opened in 1972, have been in the United States. Switzerland's assertion of jurisdiction over the Arelma

assets in the United States is nothing short of a frontal attack on this Court's decision in *Dole Food v. Patrickson*, 538 U.S. 468 (2003), which held that a stockholder does not own or control the assets of the corporation.

The Swiss Federation's position is contrary to the decisions of its own Supreme Court which permitted the return to the Philippines of Marcos funds located in Switzerland. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997) and *In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.101/1997/zus, at C19 (Jan. 7, 1998).[6] In these decisions, the Swiss Federal Court explicitly conditioned return of the funds on the Republic's compensation of Filipino human rights victims, referring explicitly to the judgment for the human rights victims in the case underlying the present attempt to enforce a judgment. As the court of appeals pointed out, the human rights victims have never been compensated. *See* ROP 9a-10a.

CONCLUSION

This Court should resist the manipulations of the Republic, whose objective is to preclude compensation to its own abused citizens despite a judgment

[6] These decisions were trial exhibits and reproduced in the appellate court record.

rendered in a United States court. The Ninth Circuit followed the dictates of Rule 19(b) and the roadmap laid down in *Provident Tradesmens Bank & Trust, supra,* in considering and balancing the equities as to whether the litigation should be dismissed for lack of a necessary party, paying due attention to the Republic's status as a foreign government entitled to immunity. Rule 19(b) demands no more and accords the court of appeal's decision great latitude.

Accordingly, the petitions for a writ of certiorari should be denied to enable the interpleaded assets to be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos.

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In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners submit this brief to address the brief filed by the United States in response to the Court's invitation and the supplemental brief recently filed by respondents.

1. Respondents are incorrect in contending (Resp. Supp. Br. 2-5) that the United States takes issue with the Ninth Circuit's holding on factual grounds. In fact, the United States shows, among other serious legal errors committed below, that the Ninth Circuit's treatment of the Republic's sovereign status under Fed. R. Civ. P. 19 cannot be reconciled with the approach taken either by this Court or by other courts of appeals. See U.S. Br. 9-11. Although respondents complain that the decisions cited by the United States as creating this conflict involved suits involving states, Indian tribes, or the United States itself rather than foreign nations (Resp. Supp. Br. 5), that distinction is wholly immaterial; in this context, principles of sovereign immunity work identically as to each type of sovereign. Certainly, the "alternative method[] of resolving the dispute" invoked by respondents as being available in the decisions cited by the United States that addressed domestic sovereigns (*id.* at 5) – congressional legislation displacing the sovereign's immunity – is no less available when a foreign sovereign is involved.

2. Respondents' improbable assertion that the Republic (see Resp. Supp. Br. 6-9) and the Swiss Federation (see *id.* at 9-10) have joined for the purpose of manipulating the U.S. judicial system and frustrating the district court's decision in this case is entirely without foundation.

First, the Republic has diligently sought recovery of the assets stolen by former President Marcos, including those secreted with Arelma, for more than twenty years. See Pet. 2-4. As the United States notes, the Republic first sought Switzerland's assistance in obtaining the return of assets stolen by Marcos – specifically including the shares of Arelma – in 1986. The Swiss government responded by freezing the as-

sets; the Swiss Federal Supreme Court upheld that determination in 1990. See U.S. Br. 2; Pet. 3. The Swiss Federal Supreme Court authorized transfer of the frozen assets (including the Arelma shares) to be held in escrow by the Philippine National Bank in late 1997 and early 1998, upon a finding that there was no reasonable doubt that Marcos had obtained his Swiss assets illegally. See U.S. Br. 2; Pet. 3. The forfeiture proceeding regarding the Arelma assets currently pending in the Sandiganbayan is a continuation of these long-running efforts to obtain repatriation of Marcos's stolen wealth. Respondents therefore are mistaken in asserting that there is something illegitimate or manipulative about the ongoing Philippine litigation.

Second, respondents also are incorrect in contending that the Republic "participated in the lower court proceedings in this case indirectly through other parties – [the] Philippine National Bank and Arelma – both of which it controlled." Resp. Supp. Br. 6. Respondents also made this assertion below, where it was *rejected* by the Ninth Circuit. As that court held in its initial decision in this case, "[t]he Republic and the PCGG are correct that they assert a claim distinct from those asserted by Arelma and PNB. Without the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected." Pet. App. 40a.

Third, despite respondents' contrary assertion (see Resp. Supp. Br. 7), there is nothing at all unusual or inappropriate in a sovereign choosing to participate in litigation as a plaintiff while also asserting its immunity in *other* litigation where it is named against its will as a defendant. The very point of sovereign immunity, after all, is to give the sovereign the right to choose when and under what circumstances it will subject itself to the jurisdiction of a court. That the United States is a frequent plaintiff in U.S. courts, for example, hardly renders illegitimate its equally frequent assertion of sovereign immunity in those courts. Here, the Republic sought dismissal of this litigation at the outset; it was of the

view that a dispute between the Republic and its former President, concerning the ownership of assets stolen from the Republic by the former President during his tenure in office – and that also involves claims made by Philippine citizens (not all of whom are members of the Pimentel class) arising out of injuries they suffered in the Philippines at the hands of the former President – should be resolved by a Philippine court. There was nothing manipulative about that election.

Fourth, the decision of the United Nations Human Rights Committee that is invoked by respondents (at Br. 8) is wholly beside the point here. That decision addressed the Philippine Supreme Court's very lengthy delay in resolving an appeal challenging dismissal of a suit brought in a Philippine court to enforce a judgment for human rights claimants entered against the Marcos estate by a U.S. court. The Committee found that the delay violated certain of the Republic's obligations under international law. *Pimentel* v. *The Philippines*, No. 1320/2004 (Mar. 19, 2007), ¶¶ 9.2, 10, 11. Noting that the Philippine Supreme Court had in fact ultimately reversed the dismissal and that the case to enforce the U.S. judgment *is* now proceeding in the Philippine trial court, however, the Committee determined that the claimants were required to exhaust their remedies *in the Philippine courts*. *Id.* ¶ 8.2. In any event, and more fundamentally, the determination that Marcos's victims are entitled to a fair adjudication of their claims against him in the Philippines has nothing at all to do with the question in this case: whether a U.S. court may adjudicate ownership of property claimed by a foreign sovereign.

Respondents make the same sort of fundamental error in contending that the Republic's position in this litigation is somehow inconsistent with its past support for plaintiffs seeking relief *from Marcos and his estate* in U.S. courts. See Resp. Supp. Br. 9. The Republic did not, and does not, oppose the efforts of Marcos's victims and creditors to recover from his estate. But the question in this litigation is not

whether U.S. courts may adjudicate human rights claims against Marcos: *it is whether the Arelma assets belong to the Republic and never were a part of the Marcos estate at all.* That question currently is being litigated between the Republic and the estate before the Sandiganbayan.

Fifth, it should be manifest that Switzerland's diplomatic note relating to this litigation is neither "manipulative" nor "contrary to the decisions of its own Supreme Court." Resp. Supp. Br. 9, 10. In fact, the Swiss Federal Supreme Court rejected an attempt by these respondents to attach assets held by Marcos in Switzerland, noting that such efforts would "prevent mutual assistance measures of Switzerland" to repatriate stolen assets to the Phlippines *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc., et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997), at 33. Although the court expressed sympathy for human rights plaintiffs, it explained that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its organs." *Id.* at 28.

Having been unsuccessful in Switzerland, respondents are now trying an identical tactic in the United States. That is why Switzerland, in urging the United States to seek reversal of the Ninth Circuit's decision here, noted that (1) the Swiss Federal Supreme Court decisions in 1997 and 1998 "affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations of the Marcos regime"; (2) the decision below runs "counter to the current trends in multilateral cooperation" in repatriating stolen assets to the country of origin; (3) that decision improperly "seem[s] to negate the Philippines' sovereign interests"; and

(4) the Ninth Circuit's decision also "could make future governmental cooperation in such matters more complicated." Pet. Reply Br. App. 1a-2a.

3. Finally, and most significantly, respondents' criticism of the Philippine and Swiss governments should not obscure the great legal and practical significance of the issues presented in the petition. Echoing concerns raised by the governments of the Philippines and Switzerland, the United States has informed the Court that the Ninth Circuit's decision "raises significant concerns with respect to the Nation's foreign relations. It prejudices ongoing litigation in the Philippines regarding a matter of great public concern to that country, conflicts with an understanding between the Philippines and Switzerland regarding adjudication of the Marcos assets, and threatens to undermine the ability of the United States to enforce its forfeiture judgments abroad as well as to assert sovereign immunity in foreign courts in similar circumstances." U.S. Br. 7. The holding below therefore threatens both "to undermine significant interests of the United States" and to "undermine multilateral anti-corruption cooperation." *Id.* at 18, 19. These considerations, which are not addressed at all by respondents, make review imperative.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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REPLY BRIEF FOR THE PETITIONERS

Respondent and his *amici* advocate a regime that is guaranteed to produce inequitable and inefficient results. They insist that the district court properly resolved competing claims to the Arelma assets in the absence of the Republic, one of the principal claimants. They add that, although the Republic "technically" would not be bound by this judgment, the award of the assets to respondent "would nonetheless resolve this controversy as a practical matter" and "cannot be undone." *Amicus* Merrill Lynch ("Merrill") Br. 29, 30. If they are right in this, the inconsistency of the outcome they propose with principles of sovereign immunity is manifest, as property that always has been owned by the Republic will be handed over to third parties. And if they are wrong and the Republic subsequently *could* bring a successful suit for this same property against Merrill, the result would be duplicative litigation and duplicative liability for Merrill. Either way, the outcome would be profoundly unfair to someone—which is precisely what Rule 19 was designed to avoid.

And that is not the end of the mischief that would be caused by the approach advanced by respondent and his *amici*. They do not deny that their rule is inconsistent with the international consensus, accepted by the United States, that stolen assets should be returned to the nation of origin. They accept that their proposed outcome would interfere with the Republic's effort to have its courts settle the ownership of assets that, it believes, were stolen by its former President. And in all of this, they put the cart before the horse: they insist that respondent's asserted interest in the Arelma assets must be protected, even though his interest is entirely derivative

of any rights in those assets held by the Marcos estate and the Sandiganbayan is, at this moment, considering whether those assets always have belonged to the Republic and *not* to the estate. Because *that* proceeding should resolve ownership of the Arelma assets, and because any litigation in this country concerning those assets should follow the Sandiganbayan's ruling, the decision below should be reversed.

A. The Rule 19 Question Was Properly Brought Before The Court Of Appeals And This Court.

1. PNB and Arelma have the right to present the Rule 19 issue.

Respondent offers no serious response to the argument that PNB and Arelma properly brought the Rule 19 issue before the Ninth Circuit and to this Court. Respondent argues only that PNB and Arelma, lack standing, or that the case has become moot as to them, because they did not seek certiorari to challenge the award of Arelma's funds to respondent on the merits. Resp. Br. 32–34. This contention is insubstantial.

PNB and Arelma consistently have expressed one interest in this litigation: they requested that "all assets in the [disputed] Account * * * should be awarded to Arelma and delivered to PNB, as Arelma's shareholder and as escrow holder, *to be held in escrow by PNB pursuant to the order of the Swiss government and its duties as escrow holder.*" Arelma/PNB CA9 E.R. 76 (emphasis added). From the outset, they sought to vindicate this interest through dismissal of the interpleader action under Rule 19(b). See Pet. Br. 8–9 n.7, 18–19. When the

district court, having denied the Rule 19 motion to dismiss, ultimately ruled against PNB and Arelma on the merits, they plainly were aggrieved by the Rule 19 determination and sought to remedy their injury by appealing that ruling (see Pet. Br. 9 n.8) and then by seeking certiorari on that question in this Court. If PNB and Arelma prevail on the Rule 19 issue here, the judgment against them will be set aside, their injury (*i.e.*, the award of the assets to respondent) will be wholly redressed, and the Arelma assets will be available for distribution according to the outcome of the proceedings in the Philippines—as PNB and Arelma have at all times sought. There can be no doubt that, as aggrieved parties whose injury would be thus redressed by success in the litigation, they have standing to pursue their current Rule 19 claim in this Court.

Respondent's argument to the contrary turns entirely on the assertion that PNB and Arelma lack standing because they "suffered no injury from the denial of their Rule 19(b) motion" and have no further interest in the litigation because they did not, in this Court, "challenge the denial of their claims to the Arelma assets on the merits." Resp. Br. 31. But this assertion has no foundation. PNB and Arelma take the position that they have a right (and, indeed, a legal obligation under PNB's escrow agreement) to dispose of the Arelma assets in accord with the judgment of a Philippine court. Insofar as standing is concerned, that they now seek to accomplish this result through dismissal of the interpleader under Rule 19(b) rather than through a ruling on the merits is wholly immaterial.

Not surprisingly, the Court has rejected the very contention respondent advances here: that Article

III requires parties to "demonstrate a connection between the injuries they claim and the * * * rights being asserted." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978). Indeed, in addressing appellate standing, the Court has held that a party adversely affected by a judgment may appeal on procedural grounds to remedy a continuing injury even when it may not appeal the merits. See *Deposit Guaranty Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 334 n.6 (1980). Because PNB and Arelma accordingly have standing—and because respondent concedes that appellate courts must address the question of indispensability so long as there is standing (Resp. Br. 35)—the Rule 19(b) question is properly before this Court.[1]

2. The Republic also was entitled to appeal and seek review in this Court.

The Court therefore need not reach the appealability question it posed to the parties. If it does, however, it should hold that the Republic did have the right to appeal and to seek review in this Court

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[1] The cases cited by respondent (Resp. Br. 33–34) in fact demonstrate why PNB and Arelma are parties to a live controversy. In *Ashcroft* v. *Mattis*, 431 U.S. 171, 172–173 (1977) (per curiam), the Court held that the court of appeals was without jurisdiction to review the denial of a declaratory judgment where the plaintiff, who had abandoned a claim for money damages, had no remaining injury that could be redressed by further judicial action. But here, if PNB and Arelma prevail, their injury—the award of the Arelma assets to respondent—will be remedied. Similarly, in *Horizon Bank & Trust Co.* v. *Massachusetts*, 391 F.3d 48, 54 (1st Cir. 2004), the First Circuit refused to consider a Rule 19 appeal only after Massachusetts conceded that its interests were inferior to those of the United States and another creditor and that it stood no chance of recovering on its claim.

on the Rule 19(b) question. In arguing to the contrary, respondent simply disregards the considerations that are controlling here: that the Republic *was* a party, sought dismissal of itself *and* of the case, received only half of the relief sought—and, to protect its interests, still needs the relief it originally requested and was denied by the district court. If, in these circumstances, the Republic may not appeal, its sovereign immunity will be drained of much of its practical value and the recognition of its immunity actually will leave it substantially worse off than when it began.

In challenging the Republic's right to appeal, respondent's principal contention is that the Republic should have intervened in the case. Resp. Br. 24–30. But this suggestion is nonsensical. The Republic was not a stranger to the litigation; it had been a party and, in that capacity, had sought relief from the district court. Respondent evidently is of the view that, because the half of the requested relief that the Republic obtained was dismissal of itself from the litigation, it was obligated to intervene so that—having just been dismissed—it could then rejoin the suit for purposes of appeal. To say the least, this would be a bizarre requirement.

And that would be especially so if, as respondent indicates (Resp. Br. 24), the Republic could have intervened without surrendering its immunity. Such limited intervention, which would not have made the Republic "a full participant" that was "vulnerable to complete adjudication" (*Schneider* v. *Dunbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)), would have amounted to a meaningless formality. Typically, "the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant

is part of the price paid for intervention." *Ibid.* (citation and internal quotation marks omitted). But that would not have been the case here. Accordingly, there would have been absolutely no practical consequence to requiring intervention by the Republic. Cf. *Devlin* v. *Scardelletti*, 536 U.S. 1, 12 (2002) ("Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the Government's suggested [intervention] requirement.").[2]

Respondent gets no further with his argument (Resp. Br. 21–24) that, although the Republic requested the relief that is now the subject of this proceeding when it was first before the district court and initially appealed to the Ninth Circuit, it lost its right to appeal when it did not participate in subse-

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[2] *South Carolina* v. *Wesley*, 155 U.S. 542 (1895), and *Georgia v. Jesup*, 106 U.S. 458 (1882), cited by respondent (at Br. 27–28), are inapposite here. *Wesley* involved what the Court described as an irregular proceeding in which the State filed a writ of error to challenge the resolution of a land dispute between parties who were "sued as individuals" but had some association with the State. 155 U.S. at 545. Unlike the Republic here, the State in *Wesley* did not participate as a party in the trial court, and its claim was not that the State itself was an indispensable party. In *Jesup*, the Court, on Georgia's appeal, affirmed a judgment in a private foreclosure suit to which the State was not a party. In so doing, the Court made clear that the State lacked the right to pursue an appeal because it was not prejudiced by the decision below: "In no legal sense has the state been injured by the order dismissing its petition." 106 U.S. at 464. The Court added that, as to the part of the judgment that was adverse to the State, "[i]f the state, not being a party to the suit, could have appealed therefrom, it has not done so." *Ibid.*

quent remand proceedings. The Republic's absence from the remand hardly made it "untenable" for the district court to decide the Rule 19(b) question, as respondent now suggests (Resp. Br. 27); courts (at both the district court and the appellate levels) routinely decide the Rule 19 status of absent parties. See Pet. Br. 18–19. And the Republic did not use its "immunity as both a shield and a sword" (Resp. Br. 27) by failing to press the case for Rule 19 dismissal after the Ninth Circuit remand. The only party that could have been prejudiced by that failure was the Republic itself, which lost the opportunity to offer additional support for its position.

One way to view the problem here is to consider the outcome had the district court simultaneously granted the Republic's motion to dismiss it from the suit on sovereign immunity grounds and denied its motion to dismiss the action under Rule 19(b). In such circumstances, it would be a bizarre and "self-defeating judicial construction" (*DiBella* v. *United States*, 369 U.S. 121, 126 (1962)) to hold either that the Republic was precluded from immediately appealing the denial of its motion to dismiss the action or that it had to ask to be let back into the suit so that it could appeal. Yet the situation here, although more convoluted procedurally (because the Ninth Circuit in the initial appeal stayed rather than dismissed the action and the district court vacated the stay on remand rather than await the Sandiganbayan's decision), is identical in principle: the court denied essential relief to a party that was then dismissed from the case. In such circumstances, where the denial of the Republic's Rule 19 motion "amounted to a 'final decision of [its] right" not to have the case go forward (*Devlin*, 536 U.S. at 9), nothing in this Court's doctrine precludes an appeal.

B. This Action Should Not Proceed In The Absence Of A Necessary Sovereign.

In our opening brief, we explain that the Republic's sovereign immunity is itself a "compelling" consideration that requires dismissal of this suit under Rule 19(b). *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118–119 (1968). See Pet. Br. 27–36. Our brief (at 31–33) points to decisions of this and other courts applying that principle to hold that suit must be dismissed when a sovereign is a necessary party because a sovereign's interest in property "cannot be tried 'behind its back.'" *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945). Respondent and his *amici* make virtually no response to this point: they do not deny that the holding below effectively vitiated the Republic's immunity and they do not cite, let alone attempt to distinguish, this authority.

The arguments they do make to discount the import of the Republic's immunity are unavailing. Respondent contends principally that decisions involving the States and the United States are inapplicable to foreign sovereigns because (assertedly in contrast with the domestic context) there are no "alternative means" in this country to resolve disputes with foreign governments. Resp. Br. 50; see *id.* at 46–47. But there also were no alternative remedies available in any of the decisions cited in our opening brief that held domestic sovereigns indispensable; indeed, some of those decisions specifically noted the *unavailability* of adequate alternative remedies but nevertheless held "dismissal of the suit * * * mandated by the policy of immunity." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). On the other hand, so far as Rule 19(b) is

concerned, adequate alternative remedies are no *less* available when foreign than when domestic sovereigns are involved: under Rule 19(b), "[t]here is no guaranty that the plaintiff can proceed in a court in the United States. The preferred alternative forum may be in a foreign country." 4 J. Moore *et al.*, *Moore's Federal Practice* § 19.05[5][b], at 19-103 (3d ed. 2007) (citing cases). And the foreign policy implications of suits impinging upon the interests of other countries means that the immunity of foreign sovereigns is, if anything, entitled to *greater* protection than that of their domestic counterparts. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446 (1979) (more searching inquiry required under the Foreign than the Interstate Commerce Clause).

Respondent also contends that, even in the domestic context, "[n]umerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties." Resp. Br. 46 n.20; see *id.* at 47–50. But this assertion, too, misses the mark: respondent cannot point to *any* decision holding that a sovereign found to be "necessary" in a suit with private litigants was not also indispensable, and we are not aware of one.[3]

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[3] Although respondent alludes to "[n]umerous cases," he mentions only two. In one of them, the sovereign Indian tribe was not "necessary" at all under Rule 19(a) because the United States appeared to defend the Tribe's interests (*Artichoke Joe's* v. *Norton*, 216 F. Supp. 2d 1084, 1118–1119 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003)); in the other, a New York state court applied its own joinder law, which differs in its terms from Rule 19(b) (*Saratoga County Chamber of Commerce, Inc.* v. *Pataki*, 798 N.E.2d 1047, 1058–1059 & n.9 (N.Y. 2003)). Other decisions cited by respondent for the proposition that courts allow claims to proceed in the absence of sovereigns are wholly off point. Some involved tribes

that were not necessary parties because the United States participated in the litigation and protected their interests. *Kansas* v. *United States*, 249 F.3d 1213, 1225–1227 (10th Cir. 2001); *Sac & Fox Nation of Mo.* v. *Norton*, 240 F.3d 1250, 1258–1260 (10th Cir. 2001). In others, litigation would not prejudice the absent party. *United States ex rel. Steele* v. *Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 (8th Cir. 1998); *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997); *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 458 (10th Cir. 1952) (employing common-law definition of indispensability); *Wyandotte Nation* v. *City of Kan. City*, 200 F. Supp. 2d 1279, 1296 (D. Kan. 2002); *Narragansett Tribe of Indians* v. *S. R.I. Land Dev. Corp.*, 418 F. Supp. 798, 811–813 & n.5 (D.R.I. 1976). One decision was made in state court and relied upon the state constitution. *Dairyland Greyhound Park, Inc.* v. *McCallum*, 655 N.W.2d 474, 486–487 (Wis. Ct. App. 2002). Another did not involve a sovereign at all. *Imperial Appliance Corp.* v. *Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967). And a final case *was*, in fact, dismissed for nonjoinder of an indispensable party. *Davis* v. *United States*, 343 F.3d 1282, 1288–1294 (10th Cir. 2003) (affirming the district court dismissal on remand from *Davis* v. *United States*, 192 F.3d 951 (10th Cir. 1999)). Respondent also cites three cases supposedly demonstrating the flexibility of the Rule 19(b) inquiry in the face of state sovereignty. Again, the decisions do not support respondent's broad assertion. In one, the court expressly declined to reach Rule 19(b) after the indispensability issue was mooted by the court's determination that Massachusetts could not assert Eleventh Amendment immunity. *Hudson Savings Bank* v. *Austin*, 479 F.3d 102, 109–110 (1st Cir. 2007). The other two involved the unusual circumstance where Massachusetts and the United States were adverse, each sovereign asserted immunity in the other's court, and the United States, whose claim had priority, sought continuation of the suit in federal court. *GE Capital Mortgage Servs., Inc.* v. *Estate of Lugo*, 319 F. Supp. 2d 127, 134 & n.43 (D. Mass. 2004); *Horizon Bank & Trust* v. *Flaherty*, 309 F. Supp. 2d 178, 195–196 (D. Mass.), *appeal dismissed as moot*, 391 F.3d 48 (1st Cir. 2004).

Merrill, meanwhile, would have the courts treat immunity as wholly irrelevant in interpleader cases. In its view, a foreign government may either waive its sovereign immunity and participate in the proceeding or suffer whatever consequences flow from the decision to remain on the sidelines. See Merrill Br. 22, 23–24 ("for purposes of the balancing of the equities required under Rule 19(b), PCGG is no different from a private non-intervening litigant"). But as we have explained, and as Merrill nowhere denies, this argument cannot be squared with contrary decisions of this Court or of the courts of appeals, with scholarly commentary, or with the principles that underlie the immunity doctrine. See Pet. Br. 27–34.[4]

Merrill also argues that the impact of this action on the Republic's immunity is of no moment because, as the Republic ultimately will have to waive its immunity to seek the Arelma assets through litigation in the United States, requiring participation in *this* litigation affects only the "PCGG's right to choose the time and the venue to waive [immunity] and pursue affirmative litigation." Merrill Br. 21. That contention misunderstands the nature of sovereign immunity. A fundamental aspect of the sovereign's immunity is its right to determine *when and on what terms* it will submit to suit. See, *e.g.*, *Hercules Inc.* v. *United States*, 516 U.S. 417, 422 (1996); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994); *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 307 (1990). And the Republic's exercise of that authority here was hardly capricious: it sought to protect an

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[4] Merrill notes the "proliferation of investments by foreign entities." Merrill Br. 16. But such investments would fall under the commercial activities exception to the FSIA and therefore could not raise the issue presented here.

essential sovereign interest by ensuring that *its* courts would be the first to determine ownership of assets that (it believes) were stolen within *its* territory by *its* former President during his time in office.[5]

It is no answer to this point to maintain, as do respondent and Merrill, that dismissal in circumstances like those here would give a sovereign that has a substantial interest in disputed assets a "preemptive veto" over U.S. litigation. Merrill Br. 22; see Resp. Br. 50–51. After all, such a "veto" is not unique to litigation involving sovereigns; it is a consequence of Rule 19, which frequently requires dismissal of suits even when it is a non-sovereign that cannot be joined. Moreover, dismissal of claims often is a *necessary* consequence of sovereign immunity, which may leave parties who hold even indisputably meritorious claims without a remedy.

Most important, the point of the Republic's assertion of immunity here was simply to protect the right of Philippine courts to resolve, in the first instance, the ownership of the Arelma assets as between the Republic and the estate of its former President. Assuming that the Republic prevails in that litigation, it will take whatever steps are required to secure the Arelma assets, including possible litigation in this country. Thus, dismissal here will not leave those assets in limbo indefinitely.

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[5] For this reason, respondent's observation that the Republic chose to participate as a plaintiff in other U.S. litigation (Resp. Br. 6)—principally in an effort to freeze Marcos assets to prevent their dissipation—has no bearing on its decision *not* to waive its immunity as a defendant in this action.

C. The Factors Identified In Rule 19(b) All Support Dismissal Of This Action.

Even if sovereign immunity itself were not considered a "compelling" interest within the meaning of *Provident*, the various factors specified in Rule 19(b) would mandate dismissal here. In arguing to the contrary, respondent and his *amici* have abandoned important aspects of the Ninth Circuit's reasoning. Their substitute rationales, however, are no more persuasive.[6]

1. Further litigation will prejudice the Republic's interests.

As we explain in our opening brief (at 37–42), the prejudice to the Republic caused by the judgment in this case is manifest. There can be no denying the Republic's strong claim to the Arelma assets. See *id.* at 25 n.10.[7] And while respondent is correct in not-

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[6] As respondent acknowledges, the Ninth Circuit did not apply an abuse of discretion standard in affirming the district court. Resp. Br. 38. In any event, application of such a standard now would not save the holdings below; "[i]ntelligent exercise of 'judgmental discretion' [is] not possible" when, as in this case, "the district court misread the rule." *Cloverleaf Standardbred Owners Ass'n* v. *Nat'l Bank of Wash.*, 699 F.2d 1274, 1277 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.).

[7] Respondent repeats the district court's statement that there is no evidence supporting the Republic's claim to ownership of the Arelma assets. Resp. Br. 5, 6–7. This contention cannot be advanced seriously. The Swiss Federal Supreme Court found no doubt that the Marcos Swiss assets, including Arelma, had an illegal provenance. See Pet. Br. 4. And the Philippine Supreme Court determined that, during the period 1966–1985, Ferdinand and Imelda Marcos had an aggregate income of $304,372.43 (*Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 38 (Phil. July 15, 2003)); to say the least, this finding makes it doubtful that Ferdinand Marcos

ing that the Republic would not be bound by the interpleader judgment (Resp. Br. 42), that is beside the point; the court of appeals recognized (Pet. App. 8a–9a) and Merrill concedes that the assets will be dissipated beyond recovery as a practical matter if they are disbursed to the plaintiff class.

In the face of this reality, respondent makes only one serious argument regarding the first Rule 19(b) consideration: he contends that the Republic would not prevail if it brought suit against Merrill to assert ownership of the assets. As we explain in our opening brief (at 34–36), however, the strength of the absent party's claim on the merits is not relevant to the Rule 19(b) inquiry, and the United States shows (at U.S. Br. 23–24) that this rule must apply with special force when the absent party is a sovereign.[8] In response, Merrill contends (Merrill Br. 20) that making an inquiry into the merits a part of the Rule 19(b) determination would be analogous to courts "conduct[ing] basic factfinding in determining their jurisdiction." Such an inquiry here, however, would be neither jurisdictional nor (as it would essentially require resolution of the legal claim on the merits) "basic."

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had legitimate sources for the $2 million used to capitalize Arelma in 1972.

[8] Respondent asserts that the Ninth Circuit "*did not evaluate the merits of the Republic's asserted claim*, but instead *assumed the validity of the claim* and determined that even if it were valid the Republic was barred by the statute of limitations from pursuing its claim." Resp. Br. 39–40 n.19 (emphasis in original). But dismissal on statute of limitations grounds *is* a judgment on the merits. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

Although that is enough to resolve the matter, respondent and Merrill are wrong even on their own terms because the Republic's suit against Merrill to recover the Arelma assets *could* succeed. Respondent and Merrill have largely abandoned the Ninth Circuit's rationale on this point (that a suit against Merrill would be barred by the New York statute of limitations governing cases of public corruption), and for good reason: a suit against Merrill self-evidently would be premised, not on misappropriation of public funds, but on Merrill's failure to surrender the assets to their true owner. As to this, Merrill contends that an action on such a claim would be barred by New York's six-year statute of limitations for breach of contract, which (it contends) began to run in 2000 when Merrill declined to transfer the Arelma assets to PNB pending the Sandiganbayan's decision. But for several reasons, this contention, too, is incorrect.

First, it seems most unlikely that the limitations period for breach of contract began to run in 2000. Merrill's refusal to transfer the funds at that time was not a repudiation of the agreement; Merrill declared, instead, only that it was awaiting a ruling by the Sandiganbayan and would be prepared to surrender the assets to the owner at that time. Compare, *e.g.*, *Computer Possibilities Unlimited, Inc.* v. *Mobil Oil Corp.*. 747 N.Y.S.2d 468, 476 (App. Div. 2002). A completed breach triggering the running of the statute of limitations presumably would not occur unless and until Merrill definitively refuses to transfer the funds *after* the Sandiganbayan rules. At that time, the Republic might be able to bring an action against Merrill not only for breach of contract, but also for conversion on the theory that the Republic perfected its legal right to the assets only upon the (presumably favorable) ruling of the Sandigan-

bayan. See N.Y. C.P.L.R. § 206(a) (where demand for money is necessary to start the running of the statute of limitations, limitations period begins "when the person having the right to make the demand discovered the facts upon which the right depends").[9]

Second, if the Republic prevails before the Sandiganbayan it may seek to enforce that judgment in New York. Merrill insists (Br. 28) that such an action would be precluded by N.Y. C.P.L.R. § 5303. But even if that statute would not *require* the enforcement of the Sandiganbayan judgment, its remedy is not exclusive. As the practice commentary to Section 5301 explains:

> Article 53 is really a showpiece for foreign tribunals: it occupies the CPLR more to assist a New York judgment in gaining recognition abroad than to assist a foreign judgment seeking recognition here. So liberal has New York caselaw been in the recognition of the judgments of foreign nations, in fact, that the occasion for the use of Article 53 has been rare. It has therefore received "scant judicial attention."

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[9] Merrill argues that the Republic could not assert control of the assets through Arelma (after, hypothetically, being awarded the Arelma shares by the Sandiganbayan) because Arelma's rights "were adequately protected in the interpleader by Arelma's participation in the interpleader action." Merrill Br. 27. This is a perplexing statement. If this Court reverses the Ninth Circuit's judgment, the interpleader will be set aside. At that point, whoever comes to control Arelma's shares will be entitled to instruct Arelma to enforce its contract with Merrill. It is not apparent what bearing Arelma's participation in the failed interpleader could have on the matter.

N.Y. C.P.L.R. § 5301 practice commentary (1997) (quoting *Overmyer* v. *Eliot Realty*, 371 N.Y.S.2d 246, 255 (Sup. Ct. 1975)).

As a more general matter, New York courts have indicated that, "[u]nder principles of comity, our courts should give full effect to a judgment rendered by a [foreign] court of competent jurisdiction." *Watts* v. *Swiss Bank Corp.*, 264 N.Y.S.2d 667, 668 (App. Div. 1965) (per curiam). Because it is conceded that the Philippine courts have jurisdiction to resolve ownership of the Arelma shares—and because there is no reason to doubt that ownership of the shares will determine what happens to the Arelma assets[10]—the judgment of the Sandiganbayan likely will be enforceable against Merrill in New York.

Third, as the United States notes (U.S. Br. 27 & 29 n.5) and as Merrill recognizes (Merrill Br. 24, 29), 28 U.S.C. § 2467 provides a mechanism for the Attorney General to seek enforcement of a foreign judgment of forfeiture regarding assets located in the United States. There is no obvious reason, and Merrill has not suggested one, why the Attorney General would not initiate such a proceeding here if the Philippine courts rule for the Republic. Such assistance seems likely, given the United States' strong support for international anti-corruption policies and the United States' commitment in the MLAT to as-

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[10] It may be true that an individual shareholder does not directly own the corporation's assets (see Merrill Br. 4 n.5), but "all the shareholders of a solvent corporation by unanimous consent may make any disposition of the company assets that they desire." W.M. Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 2651 (2007). Under this principle, the owner of the two Arelma shares will have the ability to dispose of the corporate assets.

sist the Republic in proceedings related to asset forfeiture. See U.S. Br. 27.

Having said all this, the complexity of these various arguments illustrates why courts would do well to avoid examination of the merits when making the Rule 19(b) inquiry, lest they be caught up in difficult and distracting collateral litigation. But if consideration of the merits is proper at all in this context, the party seeking dismissal surely need not show to a certainty that it would prevail Instead, as the United States explains (26–27), it should be enough to demonstrate that the possibility of the absent party's success cannot be categorically excluded. The Republic has made such a showing here; the Ninth Circuit and respondent are wrong in asserting that the Republic has "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. The first Rule 19(b) factor therefore decisively favors the Republic.

2. The judgment could not be structured to protect the Republic's interest.

The second Rule 19(b) factor, which asks whether the judgment could be structured to protect the absent party, points the same way. In fact, as we explain in our opening brief (at 42–43), a case where several claimants assert mutually exclusive ownership of a common fund is the paradigm of one where absent parties necessarily will be prejudiced. See also U.S. Br. 29. Respondent and his *amici*, who do not mention this consideration, appear to concede the point.

Merrill does suggest that interpleader effectively functions as an "invitation for all potential claimants to appear and press their case" and that in this regard "PCGG is no different from a private non-

intervening litigant that chose not to participate in the interpleader." Merrill Br. 22–23. But this contention has matters backwards. The danger of prejudice to any absent party, sovereign or not, is particularly acute in the interpleader setting because such a proceeding is intended to settle which of several claimants own a single asset. See Pet. Br. 41–42. And the "invitation" to the absent sovereign to participate that is contemplated by Merrill hardly is an adequate solution to that problem, as it would require surrender of the sovereign's immunity as the price for avoiding prejudice—the very outcome that this and other courts consistently have rejected. For this reason, the United States is correct in noting the likelihood "that an immune sovereign will almost always be entitled to dismissal under Rule 19(b) in an interpleader action such as this." U.S. Br. 29–30.

3. The judgment here is not "adequate."

As for the third Rule 19(b) factor, respondent also makes no serious attempt to defend the Ninth Circuit's holding that resolution of the interpleader would be "adequate" because that judgment would provide some recovery for the plaintiff class members. Instead, respondent now contends that the judgment is adequate because *Merrill* is satisfied with it. Resp. Br. 42–43. But that is hardly dispositive. The adequacy consideration looks to "the interest of *the courts and the public* in complete, consistent, and efficient settlement of controversies." *Provident*, 390 U.S. at 111 (emphasis added). That sort of "complete" resolution would be impossible here in the Republic's absence, for all agree that, at a minimum, the Republic still would be entitled to bring an action against Merrill. While Merrill may believe that such an action is improbable because it

would be unlikely to prevail, the Republic does not share that view.

In fact, the most efficient way to resolve ownership of the Arelma assets, and the only way to accomplish that goal in a single proceeding, is through dismissal of this action under Rule 19(b). Merrill is wrong in suggesting that it would face multiple suits in the event of dismissal here. To the contrary, if this Court holds that the Republic is indispensable and that the Arelma litigation may not proceed in the Republic's absence, *all* parties who participated in this action would be bound by that judgment. See 18A C. Wright *et al.*, *Federal Practice and Procedure* §§ 4435, 4438 (3d ed. 2001) ("such dismissals generally preclude relitigation of the underlying issue of * * * party joinder"; "issue preclusion should defeat any effort to relitigate the same joinder issue in a second action"). That would make it impossible for other parties to bring claims against Merrill for the Arelma funds without the participation of the Republic. And if the Republic brings an action against Merrill after a favorable ruling of the Sandiganbayan—as Merrill contends the Republic will have to do to obtain the Arelma assets—all other claimants could be joined in that action and bound by that judgment on the merits, thus satisfying the "public stake in settling disputes by wholes." *Provident*, 390 U.S. at 111.

4. Respondent and his amici *are not prejudiced by the unavailability of a forum.*

The fourth listed Rule 19(b) factor asks whether "the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Although respon-

dent complains that he has no "adequate" alternative forum open to him (Resp. Br. 40),[11] we showed in our opening brief (at 45–46) that dismissal would be warranted here even if that were so because (1) respondent's claims do not arise until *after* resolution of the dispute between the Republic and the Marcos estate, making respondent's search for a forum premature; and (2) the lack of a forum in the United States is an unexceptional consequence of the Republic's sovereign immunity. Respondent disregards these points. In any event, respondent's premise is incorrect because he *does* have a forum available in the Philippines: Philippine law entitles him to seek to intervene before the Sandiganbayan,[12] and human rights claimants have in fact filed a motion to intervene in other proceedings before that court. See *Ortigas & Co.* v. *PCGG*, Case Nos. 93, 97 (Phil. Sandiganbayan Nov. 29, 2007) (complaint-in-intervention). As we have noted (at 9, *supra*), such an overseas forum may be fully adequate for Rule 19(b) purposes.

Merrill also complains that there is no forum in this country in which it may bring suit to resolve all competing claims to the Arelma assets. If so, this,

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[11] Merrill argues that *it*, and not respondent, is the relevant "plaintiff" for purposes of this Rule 19 inquiry. Merrill Br. 13–14. We need not choose sides in this argument, however, because this Rule 19(b) consideration favors *neither* respondent nor Merrill.

[12] Phil. R. Civ. P. 19(1), which applies to the Sandiganbayan (see Rep. Act. No. 7975, § 4 (Phil. Mar. 30, 1995)), authorizes intervention by "[a] person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court."

too, is a consequence of the Republic's immunity. But it also bears emphasis that Merrill faces no real prejudice from the lack of a forum to hear its interpleader suit. As explained above, because all other claimants would be bound by a judgment of this Court dismissing this action under Rule 19(b), there is no danger that Merrill will be held liable pending resolution of the Sandiganbayan proceeding. As a stakeholder with no claim of its own to the assets, that preclusion of further litigation would fully protect Merrill's interest. After the Sandiganbayan's ruling, entitlement to the Arelma assets could be settled in a single proceeding by a U.S. court, which is precisely the outcome Merrill seeks. In this context, the balance of equities favors, not a stakeholder that faces no liability and need only continue to sit on disputed assets (as it already has for more than thirty years) until a proceeding to settle ownership is commenced in this country, but the sovereign whose substantial claim to stolen assets will be overborne if the interpleader goes to judgment.

5. Additional "compelling substantive interests" favor dismissal of this suit.

Other considerations also powerfully support dismissal of this action. *First*, respondent and his *amici* do not deny the Republic's substantial interest in having its own courts pass judgment on former President Marcos's misconduct, including his misappropriation of the Arelma funds. That consideration cuts against allowing disposition of the assets in this country prior to the ruling of the Sandiganbayan. Respondent and Merrill nevertheless assert that the Republic has been dilatory in pursuing the Arelma funds. Resp. Br. 5–6, 44–45, 54; Merrill Br. 2–3. But that simply is not so. Immediately following the

overthrow of the Marcos regime, the Republic sought the assistance of other nations, including Switzerland and the United States, in the massive undertaking of identifying and freezing the Marcos properties. In 1991, the Republic commenced forfeiture proceedings against the Marcos estate in the Sandiganbayan, while pursuing efforts throughout the 1990s to obtain return of Marcos assets to the Philippines. See Pet. Br. 4. In 2003, in holding the Swiss assets forfeit, the Philippine Supreme Court emphasized that the delay in resolving these cases was largely attributable to the obstructive litigation tactics pursued by the Marcos estate in jurisdictions around the world. *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 10 (Nov. 18, 2003) (on denial of reconsideration) (emphasis in original) ("It would be readily apparent to a reasonable mind that respondent Marcoses have been deliberately resorting to every procedural device to delay the resolution hereof. * * * *The respondent Marcoses cannot deny that the delays in this case have all been made at their instance. The records can testify to this incontrovertible fact.*").

It is true that the current motion before the Sandiganbayan regarding Arelma—which was filed after the Philippine Supreme Court's forfeiture decision to confirm that ruling's application to the Arelma assets—has been pending for a significant period. But that delay cannot be attributed to lack of zeal on the part of the Republic's enforcement authorities, who have moved the Sandiganbayan on five occasions (beginning on May 15, 2005, and most recently on Nov. 16, 2007) to expedite its decision. See *Republic of the Philippines* v. *Marcos*, Case No. 141 (Phil. Sandiganbayan Nov. 16, 2007) (Urgent Manifestation and Motion) (noting Republic's "man-

dated duty to recover at the soonest possible time ill gotten wealth that ought to revert to the Filipino people"). The Sandiganbayan itself has a very substantial caseload, including matters such as the corruption proceedings involving former President Joseph Estrada; last year it disposed of more than 600 cases. *28th Annual Report of the Sandiganbayan, Calendar Year 2006*, at 16.

Second, Merrill is wrong in labeling irrelevant U.S. and international anti-corruption policies that favor return of misappropriated assets to the country of origin. The United States, as a party to the U.N. Convention Against Corruption, is committed by U.S. law to return stolen assets and to "take such measures as may be necessary to permit its competent authorities" to assist other nations in implementing confiscation orders. See Pet. Br. 50. And as the Swiss Federal Supreme Court has explained, application of this principle means that ownership of the Arelma assets must be settled in the Philippines, where respondent must either "participate in the probate proceedings" or "claim damages from the Philippine government." See Pet. Br. 51. U.S. policy and that of other interested nations such as Switzerland therefore favors resolution of this dispute in the Philippines, while the contrary conclusion of the court below threatens to interfere with broader international anti-corruption efforts. That surely is a "compelling" reason to dismiss this action.

Third, respondent's characterization of the issue here—that the Republic "seeks to deprive [human rights victims] of compensation for their mistreatment" and is asking for a rule "that effectively forecloses the ability of victims of human rights abuses ever to collect on their judgments" (Resp. Br. 1, 55)—

fundamentally misstates the nature of this case. With the *support* of the Republic (see Resp. Br. 2, RA1–RA11), respondent and a class of human rights claimants obtained a judgment against the Marcos estate, and the Republic has no objection to respondent's efforts to collect on that judgment *from the estate*. But respondent has no judgment *against the Republic*. If the assets in dispute here belong to the Republic, respondent has no more claim to them than he does to assets of the United States or Merrill. The question in this case, which must be answered *before* respondent may assert a claim against these assets, therefore is whether they in fact belong to the Republic rather than the Marcos estate. That question is now before the Sandiganbayan and should be answered in the Philippines.

The reality is that the Republic has used the substantial assets already recovered from former President Marcos to accomplish the greatest good for the greatest number of its citizens. In accord with Philippine law and the policy choices made by the first democratic government after the overthrow of the Marcos regime, the Republic has, to date, devoted more than $650 million recovered from the Marcos Swiss assets to agrarian development that was neglected during the Marcos era and that is crucial to the well-being of the Philippine people. See Pet. Br. 49 n.19. The Republic also has made efforts to help the individual victims of the Marcos government. It twice approved undertakings to use recovered assets to assist those victims directly, although these efforts were disapproved by the Philippine courts. See *Republic of the Philippines* v. *Marcos*, Case No. 141 (Phil. Sandiganbayan July 27, 1999) (order). And compensation legislation to assist those victims currently is pending in the Philippine Con-

gress.[13] But whatever the proper outcome of these efforts, they involve a matter that is properly resolved in the Philippines by the Philippine people and their government. Courts of the United States, through manipulation of the "equitable" principles of Rule 19, have no role to play in the internal domestic affairs of allied nations.

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[13] Phil. House Bill No. 921 (approved by the House Committee on Appropriations); Phil. Sen. Bill No. 1532 (approved on third reading by the Senate).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 06-1204

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a foreign sovereign that is a necessary party to a lawsuit under Federal Rule of Civil Procedure 19(a) and has successfully invoked sovereign immunity is, under Federal Rule of Civil Procedure 19(b), an indispensable party to an action brought in the courts of the United States to settle ownership of assets claimed by that sovereign.

2. Whether the Philippines and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Philippines and its PCGG have the right to seek this Court's review of the court of appeals' opinion affirming the district court.

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Cases—Continued: Page

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Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) ..... *passim*

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United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 14

United Keetoowah Band of Cherokee Indians v. *United States*, 480 F.3d 1318 (Fed. Cir. 2007) 15

Cases—Continued: Page

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United Nations Convention Against Corruption, G.A. Res. 5814 (Oct. 31, 2003):
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In the Supreme Court of the United States

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INTEREST OF THE UNITED STATES

This case concerns the proper indispensable-party analysis under Federal Rule of Civil Procedure 19(b) when a necessary party is absent due to its sovereign immunity. At the Court's invitation, the Solicitor General filed an amicus curiae brief at the petition stage of this case.

STATEMENT

1. Ferdinand Marcos was President of the Republic of the Philippines (Philippines) for nearly 20 years. As numerous courts have documented, Marcos engaged in widespread abuses of power, including human rights abuses and misappropriation of vast amounts of money and property. See, *e.g.*, *Hilao* v. *Estate of Marcos*, 103

F.3d 789 (9th Cir. 1996); *Roxas* v. *Marcos*, 969 P.2d 1209 (Haw. 1998); C.A. E.R. 597 (ER) (*Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. 2003)).

In 1972, Marcos created Arelma, S.A. (Arelma) under the laws of Panama and opened an account in its name at Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) in New York. Pet. App. 45a. The funds placed into that account were allegedly obtained by Marcos through misuse of his public office. *Id.* at 2a. Ownership of Arelma is represented by two bearer share certificates that are held in escrow by the Philippine National Bank (PNB), after being transferred there by an order of the Swiss Federal Supreme Court. *Id.* at 45a-46a, 49a.

The assets in the Merrill Lynch account are the subject of this interpleader action. Arelma claims the assets based on its ownership of the account; PNB's claim is based on its custody of the Arelma shares. The Philippines and the Philippine Presidential Commission on Good Government (PCGG) (together the Republic) claim the funds under a Philippine statute (Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955)) providing that any property acquired by a public officer through misuse of his office is forfeited to the government *ab initio*.

Respondent Mariano Pimentel represents a class of human rights victims (Pimentel claimants) who obtained a $2 billion judgment against the Marcos estate in February 1995. See *Hilao* v. *Estate of Marcos*, *supra*. The Pimentel claimants seek to execute that judgment against the Merrill Lynch account, claiming that Arelma

was a shell created to hide Marcos's personal assets. Br. in Opp. 3, 5.[1]

2. After Marcos's ouster in 1986, the Philippine government created PCGG to recover Marcos's illegitimate wealth, much of which had been removed from the Philippines. ER 110. In April 1986, PCGG made a request to the Swiss government for mutual assistance, seeking return of Marcos's assets, including the Arelma shares. ER 288, 313. The Swiss government froze those assets, ordering them held until judgment had been reached in Philippine courts as to their ownership. ER 288, 313. The Swiss Federal Supreme Court upheld the freeze in 1990. ER 348-349.

In 1991, PCGG commenced a forfeiture proceeding against Marcos in the Sandiganbayan, a Philippine court with jurisdiction over political corruption cases, based on the Philippine forfeiture statute. ER 174-251.

In late 1997 and early 1998, while the forfeiture action was pending, the Swiss Federal Supreme Court transferred the frozen assets, including the Arelma shares, to an escrow account at PNB pending a final ownership determination by the Sandiganbayan. ER 289, 347-385. After that transfer, PCGG asked Merrill Lynch to transfer the assets it held for Arelma to the PNB account. Merrill Lynch declined, noting that the transfer of the Arelma shares to PNB was provisional only, and that there were other claimants to the fund. ER 393-395.

On September 19, 2000, the Sandiganbayan granted PCGG's motion for partial summary judgment, holding

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[1] Other claimants, the Estate of Roger Roxas and Golden Budha Corporation, are judgment creditors of Marcos's wife. *Roxas*, 969 P.2d at 1231-1233. Their petition for a writ of certiorari, No. 06-1039, remains pending.

that the assets at issue in the motion were forfeited to the Philippines under Philippine law. ER 254-283. Although the Sandiganbayan later reversed its own decision, the Philippine Supreme Court reinstated the partial judgment in the Philippines' favor on July 15, 2003. ER 597-696.

3. On September 14, 2000, Merrill Lynch commenced this interpleader action in federal district court in Hawaii to settle competing claims to the Arelma account's assets. ER 34. As required by 28 U.S.C. 1335(a), Merrill Lynch deposited all $35 million in assets with the court. Pet. App. 46a.

The Republic asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. 1604. The Republic, Arelma, and PNB also all moved to dismiss the interpleader action, contending that the Republic was an indispensable party. ER 50-61, 970, 993; Pet. App. 31a-32a; Fed. R. Civ. P. 19(b). The district court instead dismissed the Republic's claims on the merits, without addressing its assertion of immunity. Pet. App. 32a.

On October 31, 2002, the court of appeals held, on interlocutory appeal, that the Republic was immune. Pet. App. 36a-39a. The court also found the Republic to be a necessary party under Rule 19(a), since "[w]ithout the Republic" as a party, its "interests in the subject matter are not protected." *Id.* at 40a. While the court noted that the Republic's unavailability militated in favor of dismissal under Rule 19(b), it also recognized that the Pimentel claimants and Merrill Lynch had competing interests. *Id.* at 41a. Rather than resolve that conflict, the court ordered a stay of the interpleader suit pending resolution of the Philippine litigation. *Id.* at 42a. The court noted that "later developments may ren-

der it more equitably feasible for proceedings to go forward in this case," such as "resolution of the litigation in the Philippines" or a change in the Republic's immunity status. *Ibid.*

On June 20, 2003, the district court vacated the stay, concluding that the outcome of the proceedings before the Sandiganbayan would have no bearing on the interpleader action because the district court had exclusive jurisdiction over the Arelma assets. ER 697-699. The court certified its order under 28 U.S.C. 1292(b), and the Republic, Arelma, and PNB appealed. The Ninth Circuit affirmed. J.A. 26-27.

On August 14, 2003, while that appeal was pending, the district court denied the motions to dismiss the case under Rule 19(b). Pet. App. 55a-60a. The court held that the Republic did not have a "legally protectible claim" that would be impaired by the interpleader because any claim it might have would be barred by the New York statute of limitations. *Id.* at 57a-59a. The court also rejected the contention that the disputed assets were covered by the forfeiture proceeding in the Philippines. The court found that the petition for forfeiture filed in 1991 did not "seek[] forfeiture of the assets in the Arelma account at Merrill Lynch," and that the Philippine Supreme Court's decision made no mention of Arelma. *Id.* at 56a.[2] The court concluded that, in any event, the Arelma share certificates were irrelevant because Arelma was itself a party to the interpleader action. *Id.* at 57a.

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[2] The forfeiture petition does refer to Arelma and its Merrill Lynch account, though not in the context of a specific prayer for relief. ER 234, 249-250. As discussed below, the Republic specifically moved the Sandiganbayan for judgment regarding those assets in July 2004.

The district court then held a bench trial, and on July 12, 2004, awarded the entirety of the Arelma assets to the Pimentel claimants. Pet. App. 43a-54a. The court concluded that because Arelma was merely the "*alter ego*" of Marcos, it could "reverse" pierce the corporate veil and award the assets to Marcos's creditors. *Id.* at 52a, 54a.

4. On July 19, 2004, the Republic filed a motion with the Sandiganbayan, in the forfeiture proceedings begun in 1991, claiming that the "ARELMA account is now ripe for forfeiture." See C.A. Request for Judicial Notice, Ex. A at 9. It prayed that "judgment be rendered declaring the funds, properties, shares in and interests of ARELMA, wherever they may be located, as ill-gotten assets and forfeited in favor of the Republic of the Philippines." *Ibid.* That motion remains pending.

5. The Republic appealed the district court's final judgment, urging that its absence required dismissal of the entire suit pursuant to Rule 19(b). Arelma and PNB filed a separate appeal challenging the award to the Pimentel claimants as well as the ruling on the Republic's indispensability. See Arelma C.A. Br. 42-44.

The court of appeals affirmed. Pet. App. 1a-11a. It acknowledged that, in "the usual case of interpleader," a sovereign party that cannot be joined due to immunity "is indispensable and so can cause dismissal of the action." *Id.* at 6a. However, it concluded that while prejudice to a foreign state was a "powerful consideration," it was outweighed by other factors. *Id.* at 7a.

The court held that the Republic's failure to obtain a judgment in the Philippines concerning ownership of the assets, even though the Arelma shares had been in escrow at PNB since 1995, was "an equitable consideration * * * to be taken into account." Pet. App. 7a.

The court recognized that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. But the court concluded that the Republic would not be prejudiced because "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Id.* at 7a. The court reasoned that any action by the Republic against Merrill Lynch in New York would be barred by the six-year statute of limitations for actions based on misappropriation of public property. *Id.* at 8a-9a (citing N.Y. C.P.L.R. § 213 (McKinney Supp. 2007)).

Responding to the Republic's contention that "it could obtain a judgment regarding the ownership of these assets in the Philippines where it is relieved of any statute of limitations," the court of appeals concluded that the Philippine courts "would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. Accordingly, if a Philippine court issued such a judgment, a court in this country "would not be bound to give it effect." *Id.* at 7a-8a.

In considering the adequacy of the judgment in the absence of the Republic, the court found that the award would have"symbolic significance" to the "victims of the former president of the Republic." Pet. App. 9a. Although most of the Pimentel claimants were Philippine citizens who "should find redress from their own government," that consideration was "outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the[ir] president." *Id.* at 9a-10a. The court also concluded that the Pimentel claimants would have no forum in the Philippines in which to raise their claims to the Arelma assets. *Id.* at 10a.

After balancing the factors, the court of appeals concluded that "[n]o injustice" would be done to the Philippines "if it now loses what it can never effectually possess." Pet. App. 10a.

SUMMARY OF ARGUMENT

1. The question whether the Republic is an indispensable party was properly before the court of appeals and is properly before this Court. The Republic appeared in the district court, in response to a summons, and moved for two forms of relief: (1) dismissal as a defendant based on its immunity, and (2) dismissal of the entire action because the Republic is an indispensable party. Although the court of appeals recognized the Republic's immunity, the district court thereafter denied the Republic's broader request for dismissal under Rule 19(b).

The Republic satisfies both requirements for taking an appeal from that order: standing and "party" status. The court of appeals acknowledged that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App. 9a. The Republic therefore has standing to appeal.

Nor does the fact that the Republic was dismissed as immune deprive it of party status for purposes of appeal. It is self-evident that the Republic would be a party to an appeal challenging dismissal of the Republic based on its immunity. It is likewise a "party" for purposes of appealing an order adverse to it. This Court has, in other contexts, recognized that a party that is not bound by a judgment, but is adversely affected by it, may intervene for purposes of taking an appeal. And many lower courts have allowed immune parties to intervene for the limited purposes of raising a Rule 19(b)

objection. That rule reflects the common sense reality that, especially in an interpleader action, the failure to dismiss the action may deprive the sovereign's immunity of much of its practical effect. Here, because the Republic was already a party, it had no need to intervene.

In any event, even if the Republic could not appeal the Rule 19(b) order, Arelma and PNB could. They also moved to dismiss under Rule 19(b), and this Court has recognized that any defendant has standing to appeal on the ground the district court lacked jurisdiction over an indispensable party.

2. The lower courts' Rule 19(b) analysis failed to afford adequate weight to the Republic's immunity. This Court has recognized that, under Rule 19(b), some considerations can be "compelling by themselves." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968) (*Provident Bank*). Sovereign immunity is such a consideration. It is not merely a technical defect in the court's ability to reach the party, but reflects an overriding policy judgment that the party should not have to defend itself in court. The absent party's immunity, therefore, leaves little to be balanced under the other Rule 19(b) factors. Here, the Republic's immunity should have been given even greater weight because of the significant nature of its interests—recovering the vast sums that Marcos misappropriated through abuse of his office.

The court of appeals' error pervaded its consideration of each of the Rule 19(b) factors. Analyzing the first factor, the court's conclusion that the Republic would not be prejudiced depended almost exclusively on its determination that the Republic's claim was time-barred and therefore lacked merit. That analysis—which was, in any event, incorrect—effectively deprived

the Republic of its immunity by adjudicating its claim in its absence.

The court of appeal's analysis of the other factors was similarly flawed. Because the parties have mutually inconsistent claims to a limited fund, the Republic's interests cannot be protected in its absence. To the extent the court suggested that prejudice was mitigated because the Republic could sue Merrill Lynch for a second recovery, it only highlighted the extent to which this litigation cannot serve the fundamental purpose of both interpleader *and* Rule 19: to resolve disputes by wholes. Finally, the court's analysis of the fourth factor—which attached great weight to concerns that respondents would have no forum for relief—ignores the fact that that is a necessary consequence of the policy judgment to recognize a party's immunity.

ARGUMENT

I. THE REPUBLIC WAS ENTITLED TO SEEK REVIEW OF THE RULE 19(b) DETERMINATION, AS WERE ARELMA AND PNB.

A. Although the Republic successfully asserted its sovereign immunity, the district court denied its broader request to dismiss the entire suit under Rule 19(b) because it was an indispensable party. That order prejudiced the Republic's interests, and it was entitled to appeal from it. As discussed below, see p. 18, *infra*, this Court has made clear that *any* defendant may take an appeal to raise the absence of an indispensable party, see *Hanson* v. *Denckla*, 357 U.S. 235, 244-245 (1958), and Arelma and PNB therefore had standing to raise that issue on appeal. When, as here, the "absent" party is an immune sovereign that has appeared in the litigation to assert its immunity and to seek dismissal under

Rule 19(b), there is no reason why it—the party whose interests are most directly at stake—should not also be permitted to raise the Rule 19(b) issue on appeal for itself.

In its order granting certiorari, the Court directed the parties to address the additional question whether the Republic could seek review of the district court's and court of appeals' Rule 19(b) determinations, after it had been dismissed as immune. That question raises two distinct issues: (1) whether the Republic has standing to appeal; and (2) whether it is a "party" for purposes of taking an appeal. See *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002). The Republic satisfies both requirements.

1. The adverse consequences of the judgment on the Republic easily satisfy the requirements of prudential standing to appeal the district court's Rule 19(b) ruling. See *Devlin*, 536 U.S. at 7. The Republic seeks to protect its own interests in the Arelma assets and in meaningful immunity from suit; those interests are unique to it, not generalized grievances; and the Republic is within the zone of interests protected by Rule 19(b) and the FSIA. Indeed, on an earlier appeal, the court of appeals recognized that "[w]ithout the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected," and they were therefore necessary parties under Rule 19(a). Pet. App. 40a. That same determination would support a non-party's intervention as of right. See Fed. R. Civ. P. 24(a)(2) (intervention as of right if "disposition of the action may as a practical matter impair or impede the applicant's ability to protect its interest"); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967) (noting that Rules 19(a) and 24(a) are "counter-

part[s]"). That interest is also sufficient to satisfy the requirements for standing to take an appeal.

Although the lower courts granted the Republic partial relief—dismissal of it as a party on immunity grounds—that does not mean that it was not adversely affected by the denial of its request to dismiss the entire suit under Rule 19(b). Indeed, the Rule 19(b) ruling deprived the immunity ruling of much of its practical force. As the court recognized, "[i]n practical effect, a judgment in this action," entered in the Republic's absence, "will deprive the Republic of the Arelma assets." Pet. App. 9a.

This Court has recognized that a party that has obtained "some, but not all, of the relief [it] requested" from the district court is an "aggrieved" party entitled to take an appeal. *Forney* v. *Apfel*, 524 U.S. 266, 271 (1998). Although in *Forney* the aggrieved party was the plaintiff, *ibid.*, the same rule applies to a defendant that has obtained only partial success, such as dismissal of the plaintiff's claim without prejudice when it sought dismissal with prejudice. As one leading treatise observes, it is "obvious[]" that "a defendant must be allowed to appeal" in such circumstances. 15a C. Wright et al., *Federal Practice and Procedure* § 3914.6 (3d ed. 2001) (Wright). And the courts of appeals have repeatedly so held. See, *e.g.*, *Briscoe* v. *Fine*, 444 F.3d 478, 495-496 (6th Cir. 2006); *Ashley Creek Phosphate Co.* v. *Chevron USA, Inc.*, 315 F.3d 1245, 1263-1264 (10th Cir.), cert. denied, 540 U.S. 820 (2003); *H.R. Techs, Inc.* v. *Astechnologies, Inc.*, 275 F.3d 1378, 1382-1384 (Fed. Cir. 2002); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998); *Farmer* v. *McDaniel*, 98 F.3d 1548, 1549, 1553-1554 (9th Cir. 1996), cert. denied, 520 U.S. 1188 (1997); *Disher* v. *In-*

formation Res., Inc., 873 F.2d 136, 139 (7th Cir. 1989). The district court's refusal to dismiss the interpleader action entirely, as the Republic requested, prejudiced its ability to protect its interest in the Arelma assets, and it therefore has standing to appeal that order.

2. The Republic also satisfies the requirement that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Indeed, although in *Devlin* the Court made clear that it has "never * * * restricted the right to appeal to named parties," 536 U.S. at 7 (allowing appeal by non-named class member), in this case the Republic satisfies even that more stringent standard.

The Republic was named as defendant in the complaint, J.A. 14, and, as required by the FSIA, 28 U.S.C. 1608(a)(3), the district court served the complaint and summons upon it. See ER 954-955, 957. The Republic appeared and moved to have the suit dismissed as against the Republic, on the ground of immunity, and in its entirety, on the ground that the Republic was indispensable See ER 482-485. The district court denied both forms of relief, and the Republic appealed. Pet. App. 32a-33a. Although the Ninth Circuit recognized the Republic's immunity, *id.* at 37a-39a, it deferred resolution of the indispensability question, *id.* at 41a-42a. When, on remand, the district court finally denied the Rule 19(b) motions, the Republic remained a party to that motion (indeed, the Republic had filed such a motion) and as such was entitled to appeal the order denying it.

Even after a defendant has successfully obtained dismissal of the claims against it, the defendant remains a "party" to the litigation until the conclusion of any

appeal. That fact is self-evident when, for example, the plaintiff appeals the dismissal order. The defendant would be a "party" to the litigation entitled to notice of the appeal and to appear as appellee. See F.R.A.P. 3(d) (notice of the appeal to be served upon "each *party's* counsel of record") (emphasis added). If the dismissed defendant remains a "party" for purposes of defending against an appeal by the plaintiff, there is no reason why the dismissed defendant is not also a "party" for purposes of appealing an order that is adverse to it.

This Court's cases upholding intervention for purposes of appeal likewise make clear that even though a party is not technically bound by the district court's merits judgment—as is true of a defendant whose immunity has been recognized—its interests may be sufficiently implicated to warrant permitting it to take an appeal. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), the respondent sought to intervene after judgment in order to appeal the denial of class certification (without which the judgment could not bind her). *Id.* at 390. The district court denied intervention. On the respondent's appeal, the court of appeals reversed. *Ibid.* This Court affirmed that the would-be intervenor was a proper party to take an appeal. *Id.* at 394-395. Moreover, the Court made clear that the rule permitting intervention for purposes of appeal extends to "litigation that is not representative in nature, and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase." *Id.* at 395 n.16. See *Bryant* v. *Yellen*, 447 U.S. 352, 366-368 (1980) (upholding intervention for appeal by farmworkers whose ability to purchase excess land was undermined by district court's ruling).

Many lower courts have, in fact, approved of limited intervention under Rule 24(a) as a way for a person not subject to the court's jurisdiction to assert a Rule 19(b) objection. See *United Keetoowah Band of Cherokee Indians* v. *United States*, 480 F.3d 1318, 1323 (Fed. Cir. 2007) (noting Tribe's "limited intervention" to seek dismissal under Rule 19(b); reversing on merits of Rule 19(b) analysis); *Lac Du Flambeau Band of Lake Superior Chippewa Indians* v. *Norton*, 422 F.3d 490, 495 (7th Cir. 2005) (same; affirming dismissal on other grounds); *Salton, Inc.* v. *Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 875, 878 (7th Cir. 2004) (same regarding Hong Kong corporation; reversing on merits of Rule 19(b) analysis); *Southwest Ctr. for Biological Diversity* v. *United States Bureau of Reclamation*, 143 F.3d 515, 519-520, 522 (9th Cir. 1998) (same regarding States; affirming denial of motion as moot); *Fitzgerald* v. *Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16, 17-18 (1st Cir. 1989) (same regarding Puerto Rico; affirming dismissal), overruled on other grounds, *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998). That rule reflects the common sense reality that Rule 19(b), especially in an interpleader action, operates to protect the interests of absent parties. In this case, there was no need for the Republic to intervene specially to seek dismissal under Rule 19(b), as it had already been made a party to the litigation and raised its Rule 19(b) motion in that capacity.

Depriving a foreign nation of its ability to seek not just its own dismissal on sovereign immunity grounds, but dismissal of the entire action under Rule 19(b) would be particularly anomalous. Denial of the Rule 19(b) dismissal, at least in an interpleader action, deprives the sovereign immunity holding of much of its

practical force. A sovereign may have little choice but to waive its immunity if Rule 19(b) dismissal does not follow the assertion of immunity, and it would undermine the purpose of sovereign immunity to deprive the sovereign of a means to vindicate its obvious interest in the Rule 19(b) question.

3. This Court has previously exercised jurisdiction when the United States appealed in similar circumstances. In *Minnesota* v. *United States*, 305 U.S. 382 (1939), the State sued in state court to condemn land of Indian allottees held in trust by the United States. *Id.* at 383. The complaint named the United States and the allottees as defendants. *Id.* at 383-384. The United States removed to federal court, where it appeared specially, asserted its sovereign immunity, and moved to dismiss the action in its entirety. *Id.* at 384. The district court refused to dismiss the whole suit, finding "that the United States is not a necessary party" because Congress had consented to suit against the Indian allottees directly. *Ibid.* After final judgment, the United States appealed. *United States* v. *Minnesota*, 95 F.2d 468, 469 (8th Cir. 1938); see 305 U.S. at 384. The court of appeals denied a motion to dismiss the appeal, 95 F.2d at 469, and reversed, holding that because the judgment affected the United States' interests "directly and substantially," the action could not be maintained without the United States' consent to suit against it. *Id.* at 470, 472.

This Court affirmed. The Court held that "[t]he United States is an indispensable party defendant to the condemnation proceedings" against property in which it has an interest, 305 U.S. at 386, and that the suit had to be dismissed because the court lacked jurisdiction over the United States, *id.* at 388-389. Although the Court

did not specifically address the question of the United States' authority to appeal, the case illustrates that appeal by an immune sovereign from the denial of a Rule 19(b) motion may be necessary to protect the very interests that the government's immunity and Rule 19(b) were intended to serve.

B. Even if the Republic itself could not appeal on the Rule 19(b) issue, that issue would still be properly before this Court. Arelma and PNB were also named as defendants to the interpleader action, J.A. 13; ER 457-458, were never dismissed, and have independent standing to raise the Rule 19(b) issue.

This Court has recognized that, due to an absent party's general inability to protect itself, and the risk that those present in the litigation may not advance the absent party's interests, the indispensability rule "may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel." *Minnesota* v. *Northern Sec. Co.*, 184 U.S. 199, 235 (1902). See *Provident Bank*, 390 U.S. at 111 ("When necessary, * * * a court of appeals should, on its own initiative, take steps to protect the absent party."). But while the court *can* raise the issue itself, the advisory committee notes reflect a recognition that the court will generally have to rely on those defendants that are present to bring another party's absence to the court's attention. See Fed. R. Civ. P. 19 advisory committee notes (1966). A present defendant might "seek[] dismissal in order to protect himself against a later suit by the absent person" or "vicariously to protect the absent person against a prejudicial judgment." *Ibid.*; *Provident Bank*, 390 U.S. at 110 n.4 (quoting same). Thus, whether Arelma and PNB sought to protect their own interests or those of the Republic, they were proper parties to raise a Rule

19(b) objection in the district court, as they did. See ER 970, 993.

Having moved to dismiss the action under Rule 19(b), Arelma and PNB were also entitled to appeal the district court's denial of that motion. In *Hanson*, the Court specifically rejected an argument that "appellants lack standing to complain of a defect in [personal] jurisdiction over the nonresident trust companies, who have made no appearance." 357 U.S. at 244-245. The Court explained that, because under state law the trustee "is an indispensable party to litigation involving the validity of the trust," and the suit would therefore have to be dismissed, "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Id.* at 245 (quoting *Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 83 (1958)). See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805-806 (1985) (quoting *Hanson*) (allowing defendant to appeal finding of personal jurisdiction over plaintiff class members); see also *Hagood* v. *Southern*, 117 U.S. 52, 71 (1886) (directing dismissal of complaint upon request of defendant-appellant state officials for failure to join State, which had Eleventh Amendment immunity).

Therefore, even if the Republic could not raise the Rule 19(b) issue on appeal, Arelma and PNB were entitled to do so, as well as to bring the issue before this Court.

II. IN LIGHT OF THE REPUBLIC'S IMMUNITY AND PENDING FORFEITURE PROCEEDING IN THE PHILIPPINES, THE ACTION SHOULD HAVE BEEN DISMISSED OR STAYED PURSUANT TO RULE 19(b)

Rule 19 provides for mandatory joinder of persons "needed for just adjudication." Rule 19(a) describes persons who must be joined if feasible. For example, under Rule 19(a)(2)(i), if a person "claims an interest relating to the subject of the action," and "disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," that person must be joined if feasible. Fed. R. Civ. P. 19(a)(2)(i).[3]

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable." Rule 19(b) provides that the "factors" to be considered in making that determination "include" the following four:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an ade-

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[3] All quotations to the federal rules are to the version in effect at the time of the lower courts' decisions.

quate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). "The decision whether to dismiss * * * must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Bank*, 390 U.S. at 118-119.

In its first opinion in this case, the court of appeals held that the Republic is immune under the FSIA. Pet. App. 30a-39a. The court further held that the Republic should be joined if feasible, and that it was "difficult to see how this interpleader action can proceed in [its] absence." *Id.* at 40a-41a. Having recognized that the Republic was an absent, but necessary, party, the court of appeals entered a stay pending future proceedings in the Philippines. *Id.* at 42a.

On subsequent appeal, however, the court of appeals concluded that the Republic's absence did not require dismissal or a stay under Rule 19(b). Pet. App. 6a-10a; J.A. 27. That ruling fails to give appropriate weight to the Republic's immunity and reflects a misunderstanding of the Rule 19(b) factors, especially as applied when the absent party is a sovereign entitled to immunity. Under a proper analysis, the litigation should have been dismissed without prejudice, or at least stayed, pending a final judgment in the Philippine courts in the forfeiture proceeding.

A. An Absent Party's Sovereign Immunity Should Weigh Heavily In The Rule 19(b) Analysis

This Court has recognized the importance of sovereign immunity to the indispensable-party analysis in cases where the United States is the absent party. In

Minnesota v. *United States*, for example, the Court held that the suit must be dismissed because it was a "proceeding against property in which the United States has an interest," and the United States had not consented to suit. 305 U.S. at 386, 388-389. In *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371 (1945), the Court similarly held that where "the suit is essentially one designed to reach money which the government owns," the "government is an indispensable party." *Id.* at 375.

The Court did not, in those cases, weigh the United States' interests against the plaintiff's interest in a forum or other countervailing considerations. Rather, as the Court observed in *Provident Bank*, some factors can, in an appropriate case, be "compelling by themselves," 390 U.S. at 119, and sovereign immunity is such a factor. Other courts of appeals have recognized that where "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (quotation marks omitted); see *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (same); *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir.) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"), cert. denied, 502 U.S. 818 (1991); see also 7 Wright § 1617, at 254 ("No doubt because of the sovereign-immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests.").

That sovereign immunity will often be compelling in itself is not to suggest that an immune sovereign is auto-

matically indispensable. For instance, in certain circumstances, the interests of the absent sovereign may be adequately protected by another party that may properly represent its interests, cf. *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912) (interests of absent Indian grantors adequately represented by the United States), or relief might be structured so as not to prejudice the absent sovereign, see *Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386-391 (1980). Nonetheless, sovereign immunity is different from other considerations. When an interested party is absent because of its sovereign immunity, it is not the same as "a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [the defendant] from suit without" its consent. *Wichita & Affiliated Tribes*, 788 F.2d at 777.

Thus, a court must be especially mindful of the significance of the absent party's sovereign immunity—not only as a compelling factor in its own right, but also as it considers the other factors under Rule 19(b). That approach is necessary to ensure that the court does not subvert the purposes for which the immunity was granted. See, *e.g.*, 4 J. Moore et al., *Moore's Federal Practice* § 19.05[2][c], at 19-93 (2007) ("[C]ourts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit."). Thus, even though the Republic's immunity did not obviate the need to consider the four factors identified in Rule 19(b), it should have received far greater weight than it did. This is especially so in an interpleader action, when the difficulties of protecting absent parties while vindicating the underlying purposes of interpleader are particularly acute.

As explained below, under a proper analysis of those factors, giving appropriate consideration to the Republic's immunity, this case should have been dismissed or stayed. The Ninth Circuit's failure to do so was especially problematic because the suit impairs the Republic's critical sovereign interest in repatriating funds illegally obtained by its former president's misuse of his office. The significance of that sovereign interest is reflected in the extent of international cooperation the Republic has received, including the transfer of the Arelma shares and other assets from Switzerland to the Philippines, so that the Republic's forfeiture claim regarding Arelma could be heard by the Sandiganbayan. The impact of the Ninth Circuit's ruling on that international cooperation and the Republic's critical sovereign interests has in turn led to complications in the United States' foreign relations. See Pet. App. 65a-66a; Pet. Cert. Reply App. 1a-2a. Those further considerations reinforce the conclusion that the Republic's sovereign immunity, together with a proper analysis of the four factors identified in Rule 19(b), required dismissal or stay of this suit. See Fed. R. Civ. P. 19(b) advisory committee notes (1966) (listed factors "are not intended to exclude other considerations").

B. Under A Proper Rule 19(b) Analysis, The Action Should Have Been Dismissed Or Stayed

1. The first factor under Rule 19(b) is the prejudice that would result from adjudicating the case in a party's absence. Under that banner, the court of appeals proceeded to adjudicate the merits of the Republic's claims, finding that the Republic would not be prejudiced because it had "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. In particular, the court

concluded that any claim by the Republic to the assets would be barred by New York's six-year statute of limitations for misappropriation of public funds. *Id.* at 8a-9a (citing N.Y. C.P.L.R. § 213 (McKinney Supp. 2007)). That was a serious misapplication of the first factor. By resting its analysis so heavily on its assessment of the merits of the Republic's claims, the court in effect deprived it of the benefit of its sovereign immunity. See *Mine Safety Appliances*, 326 U.S. at 375 ("the government's liability can not be tried behind its back") (quotation marks omitted).

Although there may be circumstances in which it is appropriate to give some consideration to the underlying merits in determining the extent of prejudice to an absent party from adjudication without its participation, see *Provident Bank*, 390 U.S. at 115 (noting that it would have been proper to explore the likelihood that claims against the absent party would result in recoveries against him and therefore claims by him against the fund), it is particularly problematic for a court to assess the merits of an absent party's *own* claim when the party's absence is due to its sovereign immunity. The immune party would either have to participate in the litigation (thereby forfeiting a considerable benefit of its immunity) in order to argue the merits of its claim, or risk the possibility that the court will, as here, underestimate the strength of the party's interest. See *Wichita & Affiliated Tribes*, 788 F.2d at 776 ("It is wholly at odds with the policy of [sovereign] immunity to put the [sovereign] to th[e] Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it."); see also *FMC* v. *South Carolina Ports Auth.*, 535 U.S. 743, 762-764 (2002).

Consideration of the first factor should, instead, parallel the inquiry into whether the foreign state is a necessary party under Rule 19(a). See *Wilbur* v. *Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005), cert. denied, 546 U.S. 1173 (2006); *Davis ex rel. Davis* v. *United States*, 343 F.3d 1282 (10th Cir. 2003), cert. denied, 542 U.S. 937 (2004); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). That inquiry concerns only the absent party's "claimed interest." Fed. R. Civ. P. 19(a)(2)(ii). See *Davis*, 343 F.3d at 1289 (Tribe a necessary party because its claim was "neither fabricated nor frivolous"). Under the first prong of the Rule 19(b) analysis, then, the court must be careful not to prejudge the merits of the absent party's interest, especially where the absent party is immune from the court's jurisdiction.

The court of appeals' approach was directly to the contrary. After recognizing the Republic's interests as sufficient to make it a necessary party, Pet. App. 40a, the court proceeded to disregard those interests based on the court's own assessment of the merits of its claim, *id.* at 8a-10a. That was inappropriate; and the court's assessment of the Republic's claim was, moreover, seriously mistaken.

Contrary to the court of appeals' assumption, the Philippines would not have to sue Merrill Lynch in a New York court to establish that Marcos misappropriated the Arelma assets. That claim, which arises under a Philippine law providing that property misappropriated by public officers through abuse of their office is forfeited to the Philippines from the moment it is obtained, Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955), is presently being litigated against the Marcos estate in a special Philippine court—the Sandigan-

bayan—vested with authority to adjudicate disputes under that statute. A motion for summary judgment with respect to those assets is pending in that court. See C.A. Request for Judicial Notice, Ex. A at 9.

If the Sandiganbayan awards the Arelma shares and assets to the Republic, there is no reason to assume that the Republic would have to sue Merrill Lynch to obtain the assets in Arelma's Merrill Lynch account. Rather, the Republic, either directly or through Arelma, would simply request that Merrill Lynch transfer the assets in Arelma's account to an account in the Philippines. If Merrill Lynch were to refuse, Arelma could bring suit based on the parties' contract. Neither Arelma nor the Republic, its owner, would need to sue on the underlying claim (already adjudicated by the Sandiganbayan) that Marcos obtained the original assets illegally. They thus could seek legal redress without relitigating (subject to New York's statute of limitations) the merits of the underlying public corruption claim, as the court of appeals presumed the Republic would have to do.

The court of appeals believed that "a court of this country would not be bound to give * * * effect" to a judgment by the Sandiganbayan regarding ownership of the Arelma account and its assets because "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. The court erred in announcing so categorical a rule regarding that issue, which would be better evaluated in actual litigation to which the Republic is a party, and in which the court has before it an actual Philippine court judgment. It is unnecessary for this Court to decide whether a court in the United States would *always* be obligated to give effect to such a foreign judgment of

forfeiture. It is sufficient to recognize that the court of appeals' categorical rule that United States courts would *never* do so is erroneous.

There are, without question, instances in which a foreign judgment of forfeiture relating to assets located in the United States *may* be recognized and enforced by a court in this country. Indeed, a federal statute specifically provides for enforcement of foreign forfeiture judgments in certain circumstances. See 28 U.S.C. 2467(c) (upon certification by the Attorney General, "the United States may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States").

Further, the Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong. 1st Sess. (1995) (MLAT), and Chapters IV and V of the United Nations Convention Against Corruption (Oct. 31, 2003, GA Res. 58/4) contemplate cooperation by the two countries on proceedings related to asset forfeiture. The MLAT, for example, provides for the parties, as permitted by their domestic law, to assist each other when the object of a forfeiture proceeding in one country is located within the other country. The MLAT presupposes the existence of jurisdiction in Philippine courts over assets located in the United States, and vice versa. And, in fact, Congress has specifically granted courts in the United States jurisdiction in civil forfeiture proceedings over property located outside the United States. See 28 U.S.C. 1355(b)(2) ("Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, * * * an action or proceeding for for-

feiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.") (footnote omitted).[4]

Even assuming arguendo, however, that the Philippine courts could not adjudicate ownership of the actual assets held in the Merrill Lynch account, it is undisputed that the Philippine courts have jurisdiction to determine the ownership of Arelma itself, as the share certificates are being held in escrow in the Philippines. If ownership of Arelma were awarded to the Republic by the Sandiganbayan, there is no reason to assume, as the court of appeals did, that a court in the United States would refuse to recognize that judgment.

Finally, the court of appeals' analysis failed to take into account the logical priority of the Republic's claims over those of the Pimentel claimants. The Pimentel claimants do not assert that they *are* the rightful owners of the Arelma account assets. Rather, they ask the court to award those assets to them in partial satisfaction of their judgment in a separate proceeding against the Marcos estate. Pet. App. 52a. In contrast, the Republic claims that the funds are the proceeds of public corruption and that *these very funds* were therefore forfeited to the Philippines, under Philippine law, at the time Marcos obtained them. If the Sandiganbayan were to find that Arelma and its assets are the rightful property of the Republic, the claims of the Pimentel claimants against those assets would be vitiated. They would

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[4] If the Philippine judgment did not qualify for enforcement under Section 2467(c), there would be a further question whether the judgment would qualify for recognition under principles of international comity. See *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895).

then be seeking to execute a judgment that they possess vis-a-vis *Marcos* against assets of the *Republic*.[5]

2. The court of appeals' erroneous conclusion that the Philippines would not be prejudiced by the interpleader action (because of the asserted weakness of the Republic's claims on the merits) led it to give no consideration to the second Rule 19(b) factor: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Pet. App. 9a. In fact, the nature of this case means that the second factor points strongly towards dismissal. This case involves mutually exclusive claims to a common fund: the Republic claims the fund as property of the Republic, and the Pimentel claimants' judgment far exceeds the value of the Arelma assets. In such a situation, as the court of appeals recognized in its initial ruling, *id.* at 40a, it would be nearly impossible to shape relief so as to avoid harm to the absent parties. See *Provident Bank*, 390 U.S. at 115. Nor, plainly, can the prejudice be lessened by requiring the immune parties to intervene, as that would defeat their immunity. See *Wilbur*, 423 F.3d at 1114. It therefore seems likely that an immune sovereign will almost al-

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[5] In their Supplemental Brief in Opposition (at 8), respondents argued, citing 28 U.S.C. 2467(b)(1)(C), that a Philippine judgment of forfeiture would not be entitled to recognition because respondents could not participate in proceedings before the Sandiganbayan. But there is no reason to believe that the inability of judgment creditors to participate in a forfeiture proceeding, assuming they could not, would render the judgment unenforceable under Section 2467(d)(1)(D). The Pimentel claimants have an interest in the Arelma assets if, but only if, they are assets of the Marcos estate. The proceedings in the Sandiganbayan will resolve the prior question whether the assets are those of Marcos or the Republic.

ways be entitled to dismissal under Rule 19(b) in an interpleader action such as this.

3. The court of appeals also misapprehended the third Rule 19(b) factor—"whether a judgment rendered in the person's absence will be adequate." That factor "refer[s] to the public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U.S. at 111; see *Davis*, 343 F.3d at 1292-1293. It "promotes judicial economy by avoiding going forward with actions in which the court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined." 7 Wright § 1608, at 114.

The court of appeals, however, considered only whether the judgment would be adequate to the "victims of the former president of the Republic," by satisfying at least a small portion of their $2 billion judgment. Pet. App. 9a. But as other courts have noted, the interests of the parties before the court "cannot be given dispositive weight when the efficacy of the judgment would be at the cost of the absent parties' rights to participate in litigation that critically affect[s] their interests," *Hall*, 100 F.3d at 480, especially when a party's absence reflects its right to insist on its immunity from suit.

It is clear, moreover, that the judgment under review here would not satisfy "the public stake in settling disputes by wholes." Indeed, the court of appeals recognized that, because "any judgment entered in this action cannot bind the Republic" due to its immunity, the Republic "would remain free to sue for the Arelma assets in a forum of its choice," Pet. App. 8a, and suggested that "the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested." *Id.* at 8a-9a.

That reasoning directly contravenes the purposes of both Rule 19 *and* interpleader. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-738 (1977) (noting that in "common fund" suits one interest supporting compulsory joinder is "the interest of the defendant in avoiding multiple liability for the fund"); 7 Wright § 1618, at 274-275 ("When a particular fund or property right is involved in litigation, federal courts must be especially sensitive to the danger of contradictory judicial orders relating to that fund or right."); *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 533 n.15, 534 n.16 (1967) ("the classic situation envisioned by the sponsors of interpleader" was one where the stakeholder was "faced with conflicting but mutually exclusive claims to a policy"). If the court of appeals is correct that the Republic could sue Merrill Lynch, despite the interpleader judgment, then the whole point of the interpleader action is undermined and Merrill Lynch is clearly prejudiced. If the Republic could not, then that underscores the prejudice to the Republic of adjudication in its absence.

4. As a number of courts have recognized, the fact that a party is absent due to its sovereign immunity largely obviates consideration of the fourth Rule 19(b) factor—"whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." "[T]he plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-1294; see *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48 (2d Cir. 2004), cert. denied, 126 S. Ct. 2351 (2006); *Hall*, 100 F.3d at 480-481; *Wichita & Affiliated Tribes*, 788 F.2d at 777. That is especially so in this case, because the Pimentel claimants assert an interest only as

judgment creditors, not as persons claiming an ownership interest in the assets, and because the vast majority of the Pimentel claimants are Philippine citizens who, as the court of appeals recognized, ordinarily "should find redress from their own government" for their injuries. Pet. App. 9a.[6]

When the Rule 19(b) factors are analyzed with a proper appreciation of the importance of the Republic's sovereign immunity, it is clear that the Republic is an indispensable party, and that the action should have been dismissed without prejudice or stayed pending the final judgment of the Sandiganbayan in the forfeiture action.

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[6] In their Supplemental Brief in Opposition (at 3-4), respondents contended that the United States has a duty under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14, 1465 U.N.T.S. 85 (Dec. 10, 1984), to provide a forum for respondents' claims. However, the Senate ratified the Convention with the understanding that a private right of action is required "only for acts of torture committed in territory under the jurisdiction of that State Party." 136 Cong. Rec. 36193 (1990).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,
Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,
Respondents.

On Writ of Certiorari to theUnited States Court of Appeals for the Ninth Circuit

BRIEF OF MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* (3d ed. 2001) 13, 16

4 James Wm. Moore et al., *Moore's Federal Practice* (3d. ed. 2007) 12, 13, 24

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INTEREST OF *AMICUS CURIAE*[1]

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") is a securities broker-dealer. As a financial custodian of millions of accounts in the names of individuals, families, retirement plans and corporate and other entities, Merrill has an interest in the continuing viability of the interpleader process as a mechanism for resolving disputes between competing claimants for assets (including assets that may at some point be claimed by foreign sovereigns or their instrumentalities) without exposing the custodians of those assets to multiple liabilities. The equitable balancing test of Federal Rule of Civil Procedure 19(b) requires courts to consider the interests of the stakeholder-plaintiff in not dismissing an interpleader on the grounds that a claimant who is unavailable is an indispensable party. As set forth below, Merrill believes that the standard proposed by Petitioners gives undue weight to the interests of foreign sovereign claimants in foreclosing use of the interpleader process by innocent stakeholders and thus threatens the viability of the interpleader process.

Merrill initially filed this interpleader action in 2000 in its capacity as a disinterested stakeholder with no claim against the assets at issue and no interest in their ultimate disposition. Merrill has

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3, *amicus curiae* states that petitioners and respondents have consented to the filing of this brief, and written consents have been filed with the Court.

since been discharged by the district court and is no longer a party to this action. Merrill remains neutral as to the rightful ownership and disposition of the assets, and takes no position as to whether the Court should affirm the Ninth Circuit or remand for further consideration, and no position as to whether petitioners have the right to appeal. Merrill files this brief solely to address the adverse consequences to it as stakeholder if this action is dismissed.

Specifically, Merrill's paramount interest is in a final resolution of this dispute that avoids duplicative litigation or inconsistent claims against Merrill. Dismissal would put Merrill back where it started: holding assets subject to dispute without any practical means available to resolve the competing claims. Petitioners the Republic of the Philippines ("the Republic"), and the Philippine Presidential Commission On Good Government ("PCGG")[2] – who created this impasse by successfully asserting sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") – would still need to file suit in a U.S. court to obtain the relief PCGG seeks. By doing so, PCGG would waive its immunity under the FSIA's waiver and counterclaim provisions, 28 U.S.C. §§ 1605(a)(1) & 1607(b)-(c), thus permitting Merrill to initiate a *new* interpleader in which PCGG would then participate. But such a 'do-over' would come at the cost of delay and duplication of this entire process, which has already consumed more than seven years of litigation. Moreover, in that event, Merrill would face continuing uncertainty while it awaited such a filing by a party that has known of its

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[2] Because PCGG is the instrumentality charged with prosecuting the Republic's interests and those interests are identical, this brief will refer to them collectively as "PCGG."

interests in the subject assets for two decades and has yet to file suit in the United States.

By contrast, a final judgment by the district court binding on the remaining parties is adequate to relieve Merrill of responsibility for the assets and formally discharge it from liability to any claimant other than PCGG. That would end the dispute unless and until PCGG were to file suit against Merrill. As discussed below, such a lawsuit would be subject to dismissal on numerous legal and equitable grounds, and thus PCGG could not seek money damages against Merrill.

While this is an imperfect resolution, it is the least inequitable to the parties. Merrill would have a discharge and the burden of defending only a single potential lawsuit of dubious merit. The other claimants, including petitioners Arelma Inc. ("Arelma") and the Philippine National Bank ("PNB"), have had their day in court and were not prejudiced by the absence of PCGG. And any prejudice to PCGG would be of its own making, having sat out the interpleader on sovereign immunity grounds in favor of relying on the right to institute affirmative litigation against a party who has done nothing but comply with all applicable court orders and follow the course outlined in the Federal Rules for resolving precisely this kind of dispute.

STATEMENT OF THE CASE

This case arises from a dispute over the ownership of assets held in a brokerage account at Merrill in New York in the name of Arelma, a Panamanian corporation. Pet. App. 43a, 45a. The Arelma account was opened in 1972 with a deposit in the amount of $2 million, which had grown to $35 million by the time Merrill filed this action in 2000. *Id.* at 45a-46a.

Merrill claims no interest in these assets, and accordingly instituted an interpleader in the United States District Court for the District of Hawaii to permit the various claimants to come forward and assert their own claims.[3]

In understanding the competing claims, it is important to distinguish between (1) ownership and control of shares of Arelma (the "Arelma shares") and (2) the assets held in Arelma's name at Merrill (the "Arelma assets"). It is the Arelma assets that were held by Merrill and were deposited by Merrill with the district court pursuant to 28 U.S.C. § 1335(a)(1).[4] Thus, the question before the district court was who was entitled to the Arelma assets: (a) Arelma and/or the party controlling Arelma, or (b) a party with a valid claim against Arelma. In the absence of a valid claim against Arelma, Arelma's authorized corporate representative would ordinarily have the right, as the holder of the account, to direct Merrill concerning how to dispose of its assets. However, because the shareholders of a corporation own the corporation and not its assets,[5] Merrill could not safely direct the assets to the corporation's shareholders in the face of

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[3] Merrill was discharged by the district court on July 3, 2003 (JA 22-24) and was no longer a party when the district court issued its findings of fact and conclusions of law. Merrill did not participate in the subsequent appeal to the Ninth Circuit.

[4] Federal law provides both for statutory interpleader under 28 U.S.C. § 1335 and "Rule interpleader" under Rule 22 of the Federal Rules of Civil Procedure. While Merrill invoked both the statute and the Rule, it is § 1335 that provides federal subject matter jurisdiction for interpleader actions where there is minimal diversity, which is present here.

[5] This is a "basic tenet of American corporate law," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003), and the claimants have not cited Panamanian law to the contrary.

a valid claim against the corporation or the assets themselves. Moreover, Merrill could not safely follow the direction of Arelma's authorized corporate representative if there were a significant dispute over who had that authority. Accordingly, the district court needed to determine the ownership of the Arelma shares, but as an ancillary (not necessarily dispositive) question to its determination of the ownership of the Arelma assets.

While many claimants were named in the interpleader, only five remain relevant:

1. PCGG contends that the Arelma assets were misappropriated from the Philippine government by then-President Ferdinand Marcos, and therefore that any subsequent transfers of those assets were void *ab initio* under Philippine law. Pet. Br. at 1-3. After the fall of the Marcos government in 1986, the Republic established its instrumentality PCGG to pursue and recover assets misappropriated by the Marcos family. Early on in this process, the Republic and PCGG identified Arelma as holding assets potentially recoverable by PCGG, and in litigation with Marcos in 1987 the Republic obtained a court order in New York freezing the Arelma account at Merrill. *See* Pet. App. 47a. PCGG has pursued affirmative litigation in both Switzerland and the Philippines to recoup assets from Marcos, but Merrill has never been a party to any of those actions.

While the claimants continue to dispute precisely when and how these foreign lawsuits identified Arelma and its assets,[6] the Arelma shares have been held in escrow on PCGG's behalf since 1995 at PNB, which obtained them from Swiss authorities. Pet.

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[6] *Compare* Pet. at 4-5 & Pet. Cert. Reply at 7 n.6, *with* Resp. Cert. Opp. at 4 & n.3.

App. 7a, 46a, 49a-50a. PCGG represents that it is presently pursuing litigation in the Sandiganbayan, a Philippine court charged with handling such cases. Pet. Br. at 6. A decision of the Sandiganbayan would be appealable to the Philippine Supreme Court. *See id.* at 5-6.

On May 8, 2000, PCGG notified Merrill that instructions concerning the Arelma assets would be forthcoming. CA9 E.R. 0285. On July 12, 2000, PCGG requested that Merrill transfer the Arelma assets to an escrow account with PNB. *Id.* at 0162. Merrill responded by letter on July 19, citing competing claims over the ownership of the Arelma shares as a basis for refusing PCGG's request. *Id.* at 0163-65.

The Ninth Circuit in 2002 concluded that PCGG was a necessary party and at PCGG's request briefly stayed this action pending the resolution of the litigation in the Sandiganbayan, a move Merrill did not oppose at the time as an alternative to dismissal. Pet. App. 39a-42a.[7] More than five years later, however, there has been no decision from the

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[7] Rule 19(a) deems a party's joinder to be "required" (also referred to as a "necessary party") if, among other things:

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B). All cites to Rules 19 and 22 herein are to the revised Rules adopted as of December 1, 2007. The revisions to the rule were technical and "intended to be stylistic only." Fed. R. Civ. P. 19 & 22, advisory committee's notes (2007).

Sandiganbayan. It is Merrill's understanding that the Philippine litigation is solely between PCGG and the Marcos estate and Marcos-related interests. Pet. at 24 n.10, 27; Pet. App. 56a, 59a. The Philippine courts have asserted that they have *in rem* jurisdiction over the Arelma shares (*see* Pet. at 18 n.7; Pet. App. 61a), but because the Arelma assets are in the United States, any judgment against the Marcos interests in the Sandiganbayan would be entered without *in rem* jurisdiction over the Arelma assets and without the participation of any of the parties to this litigation.

2. PNB's only claim to the Arelma assets is in its role as escrow agent for the Arelma shares. Pet. Br. at 4-9 & n.7. PNB and Arelma both participated in the interpleader litigation, while objecting to the absence of PCGG. *See* Pet. App. 50a-54a; Pet. Br. at 7-8 & n.7. The district court found that PNB's claim to the Arelma assets, to the extent it could exercise the rights of a shareholder of Arelma, was derivative of Arelma's claim and rejected it on that basis. Pet. App. 52a.

3. Arelma's claim to the Arelma assets is based on the corporation's direct ownership of the account. The district court, applying federal common law, disregarded the corporate form of Arelma on the grounds that it was an *alter ego* of Ferdinand Marcos, and concluded that its assets could be used to satisfy judgments against Marcos' estate. Pet. App. 51a-52a, 54a.

4. Respondent Mariano Pimentel represents the interests of a class of victims of human rights abuses by the Marcos regime (the "Pimentel Class"), which obtained a judgment against the Marcos Estate in the District of Hawaii in 1996. Pet. App. 53a. The Pimentel Class filed a lawsuit against Merrill in that

court, seeking the assets in the Arelma account to satisfy that judgment, on September 6, 2000. CA9 S.E.R. 01-05. That lawsuit, combined with the other claims against the Arelma assets or for control of Arelma, led Merrill to file this action five days later. The district court awarded the Arelma assets to the Pimentel Class on the *alter ego* theory, as judgment creditors of the Marcos estate. Pet. App. 53a-54a.

5. Respondents the Estate of Roger Roxas and Golden Budha Corporation (collectively, "Roxas") also claimed the Arelma assets as individual victims of the Marcos regime. The district court rejected those claims on the theory that Roxas's judgment was against Marcos's wife Imelda, not Marcos himself. Pet. App. 54a.

Merrill takes no position on the propriety of the district court's disposition. The outcome of Petitioners' appeal, however, presents two choices: dismissal of the entire action, or a judgment by the district court binding on the parties to the interpleader. In either event, Merrill is exposed to the possibility of further litigation by PCGG, but a dismissal would also expose it to litigation by the other claimants, without a mechanism to resolve the claims in a single forum.

SUMMARY OF ARGUMENT

1. Rule 19(b) establishes a four-factor test of "equity and good conscience" for determining whether a case should proceed in the absence of a party deemed by the court to be "necessary" under Rule 19(a). The standard for evaluating this and other Rule 19(b) factors is abuse of discretion.

In an interpleader action, the fourth factor, "whether the plaintiff would have an adequate

remedy if the action were dismissed for nonjoinder," refers to the interest of the stakeholder who files the action rather than the interests of competing claimants. Here, Merrill would not have an adequate remedy if this action were dismissed after seven years of litigation: it would be left without direction as to the proper disposition of the Arelma assets, and without protection from duplicative litigation over those assets. The absence of any alternative forum to resolve all the competing claims is a powerful factor counseling against dismissal, and doubly so on appeal from a fully litigated judgment.

2. The first Rule 19(b) factor is "the extent to which a judgment rendered in the [necessary party's] absence might prejudice that person." The Court should not accord dispositive weight to PCGG's sovereign status; instead, the potential prejudice to PCGG should be evaluated as a practical matter, taking full account of the equitable considerations embedded in the Rule 19(b) factors. In weighing those factors, a court should examine the nature of the interests asserted by a foreign sovereign and the available alternatives. Congress, in enacting Rule 19(b), the interpleader statute and rules, and the FSIA, did not provide any unique exception from the usual Rule 19(b) analysis for actions in which a foreign sovereign is a necessary party. A preliminary inquiry touching on the merits of the case is no different from, and no more intrusive than, other preliminary inquiries ordinarily permitted or required under the FSIA.

Because this case involves a dispute over assets located in the United States, PCGG would need to file suit affirmatively in U.S. courts in order to recover any assets. Thus, the relevant prejudice here is not to PCGG's immunity from suit *per se*, but to PCGG's

right to use that immunity as both a sword and a shield to choose the timing and venue in which it may file suit in U.S. courts. If PCGG did file such a suit, it would then waive its immunity from joinder in an interpleader action. Accordingly, for purposes of the first Rule 19(b) factor, PCGG should be held to the consequences of deliberately choosing not to participate in an interpleader when it had the opportunity. The equities do not and should not favor such a litigant.

Prejudice to PCGG is further lessened because certain of its theories of relief are derivative of Arelma's, and are properly foreclosed, while any claims it could have brought directly against Merrill in U.S. courts would in any event be time-barred. To the extent that PCGG would be prejudiced in its ability to recover on *future* remedies, that prejudice must be weighed against the significant costs of delay in bringing such claims, the self-inflicted nature of the prejudice from its strategic decision to delay filing suit, and the obstacles that such lawsuits would themselves face.

The third Rule 19(b) factor, "whether a judgment rendered in the person's absence would be adequate," refers to the public stake in resolving controversies efficiently and this additionally favors upholding the district court's disposition of this case. Whereas a dismissal would reopen the entire controversy, the judgment of the district court would limit the dispute to one in which the remaining claims PCGG could bring against Merrill would be contingent on uncertain future events and unlikely as a practical matter to proceed beyond the pleading stage.

ARGUMENT

I. MERRILL, AS STAKEHOLDER, HAS NO ADEQUATE REMEDY IF THIS ACTION IS DISMISSED.

The absence of a "necessary" party whose interests may be impaired does not automatically compel dismissal of an action. Rule 19(b) instead requires courts to apply an equitable, rather than a legal test, considering a non-exclusive list of four factors to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Any analysis of the equities in this case must consider the fact that dismissal would leave Merrill, as stakeholder-plaintiff, exposed to multiple lawsuits with no relief in sight.

The Rule 19(b) analysis begins with the fact that "the plaintiff has an interest in having a forum" to bring "the same action, against the same parties" plus the absent party; "before trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 112, 116 (1968).[8] The absence of any alternative forum is a powerful argument against dismissal; "where a plaintiff will not have an adequate remedy elsewhere . . . district courts should ordinarily retain the case and not dismiss it pursuant to Rule 19(b)." *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash.*, 699 F.2d 1274, 1279 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.)

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[8] The fourth Rule 19(b) factor is "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4).

(quotation omitted).[9] The drafters of the Federal Rules counseled courts to "consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." Fed. R. Civ. P. 19, advisory committee's note (1966).[10]

The plaintiff's interest is especially compelling on appeal from a final judgment. "On appeal . . . [the] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage" when the "only concern" was which forum to choose. *Provident*, 390 U.S. at 110, 112. This interest is closely associated with the public interest in judicial economy embodied in the third Rule 19(b) factor; "[a]fter trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.* at 111.[11] This is

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[9] *Accord Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 90 (2d Cir. 1990); *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 497 (2d Cir. 1977).

[10] *See also* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327, 336-37 (1957) (possibility that dismissal for absence of indispensable party could foreclose plaintiff's claim entirely "is a factor which should prompt the court to proceed to a hearing and determination of the case if it possibly can do so."), *cited in Provident*, 390 U.S. at 111 n.9, as an example of commentary on the problems leading to the 1966 revisions of Rule 19.

[11] *See also Curley*, 915 F.2d at 91-92; *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1191 (3d Cir. 1979); *GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d 790, 798 (3d Cir. 1979), *aff'd*, 447 U.S. 102 (1980); 4 James Wm. Moore et al., *Moore's Federal Practice* § 19.02[4][b] (3d. ed. 2007) (after judgment "there is less interest in an alternative forum and greater public interest in preserving a valid judgment . . . even though some prejudice might result from failure to join the

especially the case in an interpleader, the entire point of which is to serve "the public stake in settling disputes by wholes, whenever possible." *Id.* at 111.

District judges have "substantial discretion" in balancing the equitable Rule 19(b) factors, and "the Rule does not call for . . . ordering [them] by rank." *Cloverleaf*, 699 F.2d at 1279 & n.11. *See also Provident*, 390 U.S. at 120-21, 126 (*citing Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-68 (1825) (Marshall, C.J.)); 4 Moore, *supra*, § 19.05 ("whether to proceed or dismiss is vested in the sound discretion of the district judge"). Accordingly, courts of appeals generally review Rule 19(b) findings under the abuse of discretion standard. *See Cloverleaf*, 699 F.2d at 1276 ("*de novo* balancing should not occur on appeal; instead, the district court's application of Rule 19(b)'s 'equity and good conscience' test should be reviewed under an 'abuse of discretion' standard.").[12]

Rule 19(b) speaks of the "remedy" available to "the plaintiff" in the event of a dismissal. The parties and the Ninth Circuit appear to assume that "the plaintiff" refers to the Pimentel Class.[13] But the logical reading of this language, in an interpleader action, is that the "plaintiff" is the stakeholder who initiates the action and seeks a discharge, rather than one of several claimants. It is the stakeholder

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absentee."); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1618, at 283 (3d ed. 2001) (A "court's concern for the expense and time that has been expended is a good illustration of the use of pragmatic considerations not specifically mentioned in Rule 19").

[12] *Accord Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F. 3d 359, 361 (7th Cir. 2004) (Posner, J.) (collecting cases); *Walsh v. Centeio*, 692 F.2d 1239, 1242 (9th Cir. 1982).

[13] *See* Pet. App. 9a-10a; Pet. Br. at 45-47; Resp. Cert. Opp. Br. at 12-13.

who files the complaint and names the parties to be joined. This is consistent with the plain language of 28 U.S.C. § 1335 (requiring "the plaintiff" to deposit the funds with the court) and Rule 22 ("[p]ersons with claims that may expose *a plaintiff* to double or multiple liability may be joined *as defendants*") Fed. R. Civ. P. 22(a)(1) (emphasis added). Lower courts have generally treated the stakeholder as the plaintiff for Rule 19(b) purposes, and this Court should do so as well.[14]

Merrill has no adequate remedy if this action is dismissed for nonjoinder due to PCGG's assertion of sovereign immunity. The Arelma assets, currently on deposit with the district court, would presumably be returned to Merrill, there being no enforceable order directing a different disposition. Merrill would be left without guidance from the courts as to the proper disposition of those assets (or who properly controls the Arelma account), and could potentially be forced – after years of litigation over a *res* in which Merrill has never claimed any interest – to defend lawsuits by the various claimants in different jurisdictions, possibly leading to inconsistent judgments. The interpleader remedy, created to resolve precisely such dilemmas, would be unavailable to Merrill unless and until PCGG chose to file suit and thus waive its immunity. Particularly given that Merrill is a mere disinterested stakeholder and no party has alleged any misconduct by Merrill, this would be deeply inequitable.

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[14] *See, e.g., AmSouth Bank v. Miss. Chem. Corp.*, 465 F. Supp. 2d 1206, 1211 (D.N.M. 2006); *Horizon Bank & Trust Co. v. Flaherty*, 309 F. Supp. 2d 178, 196-97 (D. Mass.), *appeal dismissed as moot*, 391 F.3d 48 (1st Cir. 2004); *Fleet Nat'l Bank v. Kaplan*, No. 02-11175, 2002 U.S. Dist. LEXIS 22781, at *3 (D. Mass. Oct. 11, 2002).

Petitioners do not explain how dismissal of this action could possibly provide Merrill with the relief it sought when it filed this case. They frankly assert that "the unavailability of a forum is a consequence of the Republic's immunity," and urge dismissal in favor of litigation in the Philippines. Pet. Br. at 15, 47. The Philippine court, however, has still not ruled more than seven years after this case was filed, and even if it did, it lacks the power to discharge Merrill from competing claims, and lacks the power to order distribution of the Arelma assets without confirmation of that judgment in an American court. Dismissal, as discussed *infra*, likely would result in a new interpleader action *if* the Sandiganbayan rules in favor of PCGG and *if* that ruling is upheld by the Philippine Supreme Court and *if* PCGG then files suit in the United States, thus waiving its immunity from joinder in essentially the same interpleader all over again. As this Court observed in *Provident*, this is cold comfort:

> In short, the net result of dismissal here would presumably have been a diversity action identical with this one, except that [the plaintiff] would have been *compelled to wait upon the convenience of plaintiffs over whom it had no control*, and would have been dependent upon a victory by those plaintiffs in [another lawsuit].

Provident, 390 U.S. at 127 (emphasis added).

"Equity and good conscience" do not support shifting the burden of one claimant's purposeful unavailability onto a disinterested custodian of assets that itself seeks no independent judicial relief. The federal interpleader statute, 28 U.S.C. § 1335, "is remedial and [should] be liberally construed." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 (1967). Interpleader is an ancient equitable remedy

dating back many centuries, protecting stakeholders against "the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty." *Texas v. Florida*, 306 U.S. 398, 405-06 (1939). *See also* 7 Wright, Miller & Kane, *supra*, § 1701, at 524-25. In the modern, interconnected world of global investing, interpleader is more important than ever for financial institutions beset by geographically disparate claimants. With the proliferation of investments by sovereign entities or entities with sovereign investors or business partners, or by entities that may for one reason or another come under the regulatory scrutiny of foreign governments, the potential for one claimant out of several to be a foreign sovereign within the meaning of the FSIA increases. *See* 28 U.S.C. § 1603(b)(2) ("foreign state" includes corporations majority-owned by foreign states). The test proposed by Petitioners, under which the assertion of sovereign immunity by a foreign sovereign claimant is a showstopper, would cripple the interpleader process and subject innocent stakeholder financial institutions to unfair and unpredictable litigation, uncertainty and delay.

Accordingly, the Court should prefer this litigation, however imperfect, to the complete absence of a forum for resolution of the conflicting claims confronting Merrill. In the event that the Court does not affirm the decision of the Ninth Circuit, it should not order a dismissal but instead should remand with instructions to consider the weighty equitable interests of Merrill in receiving a discharge.

II. PCGG'S SOVEREIGN STATUS SHOULD NOT ELIMINATE OR OUTWEIGH THE EQUITABLE INTERESTS OF MERRILL AND THE COURTS.

The first Rule 19(b) factor is "the extent to which a judgment rendered in the [necessary party's] absence might prejudice that person." Fed. R. Civ. P. 19(b). Petitioners argue that, where a foreign sovereign entity is the absent necessary party, that fact alone is dispositive, precluding a case-by-case examination of the nature of the prejudice to the foreign sovereign entity or a balancing of its interests against the other equitable Rule 19(b) factors. This reading of Rule 19(b) is inconsistent with this Court's decision in *Provident* and the structure of Rule 19, and reads into the Rule an exception not found in the FSIA, Rule 19 or the interpleader statutes and rules.

A. PCGG's Sovereign Status Should Not Preclude Consideration Of The Other Rule 19(b) Factors.

Because it is invoked only when an absent party is found to be necessary under Rule 19(a), the indispensable party inquiry under Rule 19(b) *always* involves some party whose rights will be affected or whose absence affects the rights of the remaining litigants, and presupposes that the equities may counsel continuing on with the remaining parties, especially if the alternatives would be worse. Thus, this Court has rejected formalistic indispensability rules, stressing that the equities relevant under Rule 19(b)

> can only be determined in the context of particular litigation . . . [and] must be based on factors varying with the different cases, some such factors being substantive, some procedural,

> some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Provident, 390 U.S. at 118-19. Petitioners' insistence that foreign sovereign immunity is always *per se* a compelling interest pretermits this fact-bound, equitable inquiry. If Rule 19(b) had been intended to "create[] a federal, common-law, substantive right in a certain class of persons" such as foreign sovereigns, it easily could have been written to do so. *Id.* at 119. Instead, the Rule provides a single standard, and courts are instructed that the four Rule 19(b) factors "*must* be examined in each case" and cannot be short-circuited by the contention that some interests have "substantive" weight as "a substitute for the analysis required by that Rule." *Id.* at 109, 118-25 (emphasis added).

Congress has nowhere granted a *per se* right to a foreign sovereign entity to quash an interpleader by its refusal to participate. Both the FSIA and the interpleader statute are complex and detailed statutory schemes, with provisions governing subject matter jurisdiction, venue, and attachment and other remedial powers. *See, e.g.*, 28 U.S.C. §§ 1330(a), 1335(a), 1397, 1441(d), 1607-1611, & 2361. The FSIA specifically precludes, in certain specified circum-

stances, attachment of assets under the sovereign's control, even to satisfy valid judgments, *see* 28 U.S.C. §§ 1609-1611, but neither statute makes any similar provision to protect the foreign sovereign entity against interpleader to resolve the sovereign's unliquidated causes of action against assets in the custody of domestic individuals or businesses. In the absence of any statutory exception to the normal operation of interpleader and Rule 19, the logical conclusion is that Congress intended that when a necessary party is absent from an interpleader due to foreign sovereign immunity, the district court should engage in the usual case-by-case balancing of the equities. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 & n.5 (2007) (declining to create "implicit FSIA exception" to rule barring appeals of remands, despite "undesirable [policy] consequences in the FSIA context," where FSIA did not amend appeal statute).[15]

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[15] Petitioners' invocation of policy considerations (Pet. Br. at 27-34) and citation to cases involving the United States or Native American Tribes ignores the distinct nature of the immunities involved. The U.S. and tribal governments enjoy sovereign immunity in U.S. courts as an adjunct to actual sovereignty, and its protections are broadly construed to effectuate the sovereign's right, in appropriate cases, to take direct executive or legislative action or to limit remedies to specially constituted tribunals. A foreign sovereign, by contrast, has no ability to assert sovereign power within the territorial United States; its immunity is a creature of statute granted by Congress as a matter of comity. The FSIA displaced the prior common law approach to such immunity, including the more restrictive approach that prevailed before 1952. *See Rep. of Austria v. Altmann*, 541 U.S. 677, 688-91 (2004).

B. A Defendant's Assertion Of Sovereign Immunity Does Not Preclude A Full Analysis Of The Practical Interests Involved.

Petitioners characterize the lower courts' examination of the practical barriers to the remedies available to PCGG – specifically, the statute of limitations applicable to any claims PCGG might bring in American courts – as itself an undue intrusion on PCGG's sovereignty. Pet. Br. at 8, 34-36, 39-40. This ignores the practical need of federal courts to conduct preliminary inquiries before dismissing a case on procedural grounds.

As a general rule, federal courts have the power to conduct basic factfinding in determining their jurisdiction.[16] Here, the district court did not require PCGG to present affirmative evidence or participate in discovery; it merely analyzed the legal issues presented on the pleadings for purposes of the practical inquiry required by Rule 19(b).[17] A pragmatic evaluation of what alternative lawsuits could feasibly be filed by the parties and what other forums remain open to hear the dispute is *always* a part of the court's "examin[ation of] the actual interest of the nonjoined person" including "the actual threat of relitigation" by the absent party. *Provident*, 390 U.S. at 116, 122. Requiring a foreign

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[16] *See, e.g., Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 704-09 (1982); *Land v. Dollar*, 330 U.S. 731, 734-35 & n.4 (1947), *overruled on other grounds, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[17] The district court took note of prior judicial proceedings, which are subject to judicial notice on a motion on the pleadings. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007).

sovereign to brief the Rule 19(b) issue in conjunction with a motion to dismiss under the FSIA is neither uncommon nor unduly burdensome and is necessary to enable the district court's informed decision on a request for the drastic remedy of dismissal of the case in its entirety.[18]

C. The Relevant Prejudice Is To PCGG's Right To Choose The Time And Venue To File Suit In The Courts Of The United States.

Much of Petitioners' argument for dismissal hinges on the premise that PCGG has an absolute right to refuse to appear in American courts. This ignores "the pragmatic consideration of the effects of the alternatives of proceeding or dismissing" required by Rule 19(b). *Provident*, 390 U.S. at 118 n.12. In fact, because the assets are located in the United States and subject to conflicting claims here, PCGG would sooner or later need to appear in a U.S. court to prosecute its claim – at which time it would waive its immunity from an interpleader. Thus, the relevant "prejudice" to PCGG's rights is not an intrusion on its right to claim the assets *without* waiving immunity, but rather on PCGG's right to choose the time and the venue to waive and pursue affirmative litigation. In weighing the equities, that interest can and should be subordinate to Merrill's right to finality and certainty and the public interest in speedy and efficient resolution of the controversy.

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[18] *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 356-60 (1993) (examining factual allegations to determine availability of exception to sovereign immunity); *Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 615-19 (1992) (same); *Robinson v. Gov't of Malay.*, 269 F.3d 133, 141 & n.7 (2d Cir. 2001) (discussing burden-shifting procedures and evaluation of evidence on motion to dismiss under FSIA).

An interpleader involving a single, disputed *res* in the possession of a disinterested stakeholder is functionally not so much a claim *against* the claimants as an invitation for all potential claimants to appear and press their case. *See State Farm*, 386 U.S. at 534-35 (where disinterested stakeholder deposits fund and files interpleader, "the fund itself is the target of the claimants" and "marks the outer limits of the controversy"). In that sense, requiring a foreign sovereign entity to choose between appearing to pursue its claim and abandoning its practical ability to recover on that claim is no more of an imposition on the foreign sovereign than compliance with any other procedural rule regarding venue, personal or subject matter jurisdiction, the statute of limitations, or the discovery rules. *Any* plaintiff in the U.S. court system, sovereign or otherwise, must abide by such rules in order to obtain relief through American courts.[19] While the FSIA gives a foreign sovereign claimant who has not filed suit a right – unavailable to private litigants – to refuse to participate, that right is not without cost: by choosing not to sue, it forgoes the possibility of recovering the assets. What the FSIA does not give foreign sovereigns is a preemptive veto over *any* litigation by U.S. litigants over assets located in the United States in which the foreign sovereign might someday come forward to claim an interest.

If PCGG were to sue Merrill to recover the Arelma assets, its appearance would waive its immunity from

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[19] This Court has previously recognized the distinction between "an attempt to bring a recognized foreign government into one of our courts as a defendant" and "a foreign government invoking our law" that "wants our law, like any other litigant, but it wants our law free from the claims of justice." *Nat'l City Bank v. Rep. of China*, 348 U.S. 356, 361-62 (1955).

related claims and expose it to the commencement of an interpleader action by Merrill, either as a counterclaim for defensive interpleader or as a separate action. *See* 28 U.S.C. §§ 1605(a)(1) (waiver exception to immunity), 1607(b) (providing that in any action brought by a foreign state in federal or state court, the foreign state waives immunity to any counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"); Fed. R. Civ. P. 22 (allowing defendant to obtain interpleader by making a cross-claim or counterclaim and stating that statutory interpleader actions under 28 U.S.C. § 1335 shall be conducted in accordance with the rule's provisions). This would follow even if PCGG sued to enforce a judgment rendered in a Philippine court. *See, e.g., Ins. Corp. of Hannover, Inc. v. Latino Americana de Reaseguros, S.A.*, 868 F. Supp. 520, 523, 526 (S.D.N.Y. 1994) (foreign claimant seeking to enforce Panamanian judgment permitted to intervene in interpleader action). An interpleader by Merrill of claimants to the disputed *res* would clearly be sufficiently connected to a PCGG suit over the same assets to implicate the FSIA's waiver and counterclaim provisions. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 491 F. Supp. 161, 166-68 (N.D. Ill. 1979) (foreign sovereign entities waived immunity from third party claims and counterclaims arising out of the same oil spill as claims brought by the sovereign entities in a multidistrict litigation). *See also Rep. of China v. Am. Express Co.*, 195 F.2d 230, 233-34 (2d Cir. 1952) (pre-FSIA case; in action to recover a deposit, foreign sovereign waived immunity from counterclaim interpleading adverse claimant to deposited funds). Accordingly, for purposes of the balancing of the equities required under Rule 19(b), PCGG is no different from a private non-intervening

litigant that chose not to participate in the interpleader action. The equities do not and should not favor such a litigant. *See* 4 Moore, *supra*, § 19.05[2][c] ("An absentee's refusal to intervene may be considered in calculating prejudice should the case proceed without the absentee.").

The fact that PCGG seeks to vindicate public interests against official corruption (Pet. Br. at 47-52) does not alter this analysis. Such aims should be accomplished through the policymaking branches of government, not through *ad hoc* rewriting of the Federal Rules of Civil Procedure. As Petitioners note, Congress has provided express authority to the Executive Branch, in appropriate cases, to obtain judicial assistance for the law enforcement efforts of foreign sovereigns in repatriating misappropriated or otherwise forfeit assets. *See* 28 U.S.C. § 2467(c); Pet. Br. at 41 n.18.[20] This mechanism, unlike a bare dismissal under Rule 19(b), provides a variety of procedural protections: a final, non-appealable judgment from the foreign court (§ 2467(b)(1)(B)-(C)), assurances that such court had jurisdiction and gave notice to affected parties (§ 2467(b)(1)(C) & (d)), and a policy determination by the Attorney General to assist the foreign government (§ 2467(b)(1)-(2)). Such procedures, if timely invoked, would presumably preempt other claims to the seized assets; certainly other claimants could not sue a financial institution

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[20] 28 U.S.C. § 2467 was enacted in 2000 as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, "to encourage international cooperation in asset forfeiture cases." Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 115-16 (2001); *see* 28 U.S.C. § 2467 (2007); H.R. Res. 1658, 106th Cong. (2000).

for complying with a district court's forfeiture order under § 2467. Nor does the text of § 2467 contemplate that the Attorney General would seek civil damages against a custodian that had disposed of the assets in accordance with a prior court order. The contrast to the consequences of a dismissal here is stark.

D. Prejudice To PCGG's Right To Sue In A Different Venue Is Limited.

To determine what an absent party will actually lose if the case proceeds in its absence, a court must look beyond the formalistic assertion of competing interests that animate Rule 19(a) and "examine each controversy to make certain that the interests really exist." *Provident*, 390 U.S. at 119. Here, that means considering what PCGG could have accomplished by suing Merrill.[21]

As the district court and the Ninth Circuit found, any claim to the Arelma assets would have to be brought in New York, the location of the *res* and of

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[21] Petitioners, citing out of context statements made by Merrill before the full extent of the dispute over the Arelma assets became apparent, contend that "had it not been for this litigation, there is every reason to believe that Merrill Lynch would have transferred the Arelma assets to the Philippines in response to a favorable ruling of the Sandiganbayan." Pet. Br. at 6 n.5 & 39-40. This ignores the fact that it was Merrill that instituted this litigation. Merrill would gladly have abided by a domesticated Philippine judicial order giving PCGG control of Arelma if there were no other competing claimants, but that is not the situation Merrill faced. With multiple parties seeking control of Arelma and its assets, guidance from a court with the ability to resolve the largest number of competing claims at once was and is essential.

Merrill's headquarters. *See* Pet. App. 8a-9a, 57a.[22] Petitioners suggest three possible causes of action against Merrill; none would provide a viable basis to survive a motion to dismiss:

1. PCGG's asserted right to the assets arises from Marcos's misappropriation of public funds, under a Philippine statute providing that "assets derived from misuse of public office are forfeit to the Republic from the moment they are appropriated." Pet. Br. at 3. Petitioners note that this statute contains no limitations period. *See id.* at 40. But this would not end the inquiry. New York's "borrowing statute" applies to time-bar claims filed in New York courts where the cause of action accrued to a non-New York resident outside of New York, if the claim would be untimely under the shorter of the New York or foreign limitations period – even when the claims are asserted under the statutory law of a foreign country. *See* N.Y. C.P.L.R. § 202 (2005); *Baena v. Woori Bank*, 515 F. Supp. 2d 414, 422 (S.D.N.Y. 2007).

The analogous limitations period under New York law would be for actions by the state "based upon the spoliation or other misappropriation of public property," for which a six-year statute of limitations begins to run upon "discovery by the state of the facts relied upon." N.Y. C.P.L.R. § 213(5).[23] PCGG discovered Marcos' misappropriation of the Arelma

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[22] Merrill will thus discuss the obstacles to recovery under New York law. Petitioners have never suggested at any stage of this case any alternative forum that would present lesser obstacles.

[23] The only alternative limitations periods would be the three-year limitations period for statutory claims and the default six-year limitations period. *See* N.Y. C.P.L.R. §§ 213(1), 214(2); *Baena*, 515 F. Supp. 2d at 422.

assets no later than 1987. *See* Pet. App. 47a. Thus, any claim under the Philippine statute would have been time-barred by 1993.

2. To the extent that Petitioners contend that PCGG could have sued Merrill on a breach of contract theory by virtue of its control of the Arelma shares,[24] such a claim would encounter at least two obstacles. First, Merrill has no contract with anyone other than the holder of the account – Arelma. Any claim by PCGG to Arelma's *assets* by virtue of its control of the Arelma *shares* is derivative of Arelma's own rights, which were adequately protected in the interpleader by Arelma's participation in the interpleader action.

Second, the New York statute of limitations for breach of contract actions is six years. *See* N.Y. C.P.L.R. § 213(2). A claim for breach of contract accrues upon the defendant's refusal to perform an obligation due under the contract, which here would be the non-payment of the Arelma assets.[25] Any claim of breach of contract thus accrued no later than July 2000, when PCGG requested that Merrill transfer the Arelma assets to the PNB and Merrill refused. CA9 E.R. 0162-65. The limitations period has come and gone and no action was ever instituted by PCGG on that demand. Petitioners cite no authority for reviving an expired limitations period by re-making the same request after the limitations period has run. *See* Pet. Br. at 40.

3. Petitioners claim that a judgment in the Philippines would be enforceable in New York courts

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[24] *See* Pet. Br. at 40-41; Pet. at 18 n.7.

[25] *See, e.g., John J. Kassner & Co. v. City of New York*, 415 N.Y.S.2d 785, 788-89 (N.Y. 1979); *State v. Fenton*, 414 N.Y.S.2d 58, 59 (3d Dep't 1979) (claim for unpaid tuition accrued when payments due).

against Merrill. Pet. Br. at 40-41. This, too, fails for several reasons. First, Merrill was not named as a party to the Philippine litigation, which is between the Republic and the Marcos estate. Section 5303 of the C.P.L.R. only allows for recognition and enforcement of a foreign country's money judgment that "is conclusive *between the parties*." N.Y. C.P.L.R. § 5303 (emphasis added). Petitioners would likewise need to show that the Philippine court had personal jurisdiction over Merrill. *See id.* §§ 5304(2) & 5305.[26]

To the extent that such a judgment is to be enforced against the assets themselves, while the Philippine court has apparently asserted *in rem* jurisdiction over the shares of Arelma, it is at best uncertain whether such assertion of jurisdiction would be recognized by U.S. courts as being over the Arelma assets, given that they were held in the United States at the time the action commenced in the Sandiganbayan. *See* Restatement (Third) of Foreign Relations Law of the United States § 421(2) (1987) (a foreign "state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if . . . the person or thing is present in the territory of the state, other than transitorily").

Thus, in the absence of the interpleader, the sole feasible options for PCGG would be to register a judgment against the Marcos estate and either seek to attach Arelma's assets as a judgment creditor of the Marcos estate (the approach taken by the

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[26] *Accord* Restatement (Third) of the Foreign Relations Law of the United States § 482 (setting forth circumstances under which U.S. courts "need not" recognize a foreign judgment, including, *inter alia*, lack of personal jurisdiction). *See also, e.g., Norex Petroleum, Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 160-62 (2d Cir. 2005); *Koster v. Automark*, 640 F.2d 77, 81 (7th Cir. 1981).

Pimentel Class), or to ask the Attorney General to initiate the forfeiture procedure set forth in 28 U.S.C. § 2467. As discussed above, either option is contingent upon a series of future events that have yet to come to pass years after the district court's judgment, and the former would trigger a defensive interpleader by Merrill. The prejudice to PCGG from its refusal to participate in the interpleader must thus be weighed not against any present alternative but against a contingent future claim – and Petitioners do not suggest any realistic alternative for what Merrill was or is supposed to do to insulate itself from the competing claims in the intervening years.

E. A Judgment Here Would Be Adequate.

The third Rule 19(b) factor is "whether a judgment rendered in the person's absence would be adequate." Fed. R. Civ. P. 19(b)(3).[27] This factor implicates "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident*, 390 U.S. at 111. Here, despite Petitioners' suggestion to the contrary, a judgment that is technically not binding on PCGG would nonetheless resolve this controversy as a practical matter. Thus, even if "[i]t might have been preferable, at the trial level, if there were a forum available in which [all the claimants] could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere" – and there was no such forum – there is now "no reason . . . to throw away a valid judgment

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[27] The second Rule 19(b) factor, "the extent to which any prejudice could be lessened or avoided" through remedial orders of the court, is not contested here; no party has suggested any protective measures to balance the competing claims or to provide a globally binding release for Merrill.

just because it [does] not theoretically settle the whole controversy." *Id.* at 116.

If the district court's judgment is affirmed by this Court or by the Ninth Circuit on remand, the Arelma assets will be distributed to the Pimentel Class, and all parties appear to agree that this cannot be undone. Even if PCGG subsequently filed suit for damages against Merrill, its claims would be barred by the obstacles set forth above; PCGG's only remedy would be to attach assets that Merrill deposited with the district court more than seven years ago and cannot get back.[28] Accordingly, the district court's judgment here is the most adequate and equitable resolution possible under these circumstances.

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[28] If the district court's judgment is affirmed, any effort to enforce a Philippine judgment in New York would then be further barred as "conflict[ing] with another final and conclusive judgment." N.Y. C.P.L.R. § 5304(5). Such a judgment would also further preclude any breach of contract action against Merrill for damages, as the doctrine of impossibility excuses a party's contractual obligation where prohibited by judicial order. *See, e.g., Organizacion JD Ltda. v. U.S. Dep't of Justice*, 18 F.3d 91, 95 (2d Cir. 1994).

CONCLUSION

For the reasons set forth above, this Court should not order dismissal of this action.

Respectfully submitted,

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In The

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF PHILIPPINE HUMAN RIGHTS GROUPS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS FOR LEAVE TO FILE BRIEF AND BRIEF FOR PHILIPPINE HUMAN RIGHTS GROUPS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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MOTION OF PHILIPPINE HUMAN RIGHTS GROUPS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Philippine Human Rights Groups respectfully move the Court for leave to file a brief of *amicus curiae* in the above-captioned case. Counsel for Respondents have granted consent for this submission. Although consent was sought from Counsel for Petitioners, such request was declined.

This *amicus curiae* brief is submitted by nine human rights groups in the Philippines. These groups emphasize different human rights issues, but all remain deeply concerned about the protection of fundamental human rights within the Republic of the Philippines, and believe that the ability of the Victims in the case underlying the present collection effort is vitally important to the protection of human rights in the Philippines. Members of these nine groups believe that it is crucial that the Victims be allowed to collect on their judgment, especially in light of the active support the Republic of the Philippines gave to the underlying claim in the early stages of this litigation and the extensive resources that the U.S. courts have given to this adjudication.

These nine Philippine human rights groups believe that this *amicus curiae* brief will be helpful to this Honorable Court, by providing some of the context for the underlying claim brought by the Class of Human

Rights Victims; by explaining the obligation under international law of the Republic of the Philippines to compensate these Victims, as reinforced recently by the United Nations Human Rights Committee; and by providing information about the continuing human rights abuses in the Philippines at the present time. The nine Philippine human rights groups emphasize that human rights can be protected only if independent courts apply the rule of law to cases brought before them without regard to the political pressures related to the claims presented. In the present interpleader action, the Republic of the Philippines presented absolutely no evidence that it is entitled to the disputed assets, and it should not be permitted to disrupt the orderly distribution of these assets at the present time.

Given their expertise on the human rights conditions in the Philippines, these nine human rights groups would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations. These groups are filing a joint brief to reduce multiple filings with the Court.

For these reasons, these nine Philippine human rights groups respectfully request that the Court grant this motion for leave to file.

Dated: February 26, 2008

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed jointly by nine human rights groups in the Philippines.[1] These groups have a strong interest in promoting human rights principles in the Philippines and they urge this Honorable Court to reject the effort of Petitioners to have this case dismissed, because such a dismissal would be a severe setback to the cause of promoting and protecting human rights in the Philippines. The individual groups are described in the paragraphs that follow.

1. Claimants 1081. Founded in 1994, Claimants 1081 consists of several thousand individuals who suffered human rights abuses during the Marcos martial law period. It helps to coordinate these victims and to work with other human rights groups to promote justice and accountability. Its Secretary General is Ramon C. Casiple.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief, and also states that Professor Jon M. Van Dyke, who is one of the counsel for the Class Human Rights Victims, assisted with the preparation of this brief in part. The costs of printing are being provided by the JEHT Foundation, 120 Wooster Street, New York, N.Y. 10012.

Pursuant to Rule 37.3, *amicus curiae* states that Respondents have consented in writing to the filing of the brief; Petitioners counsel has been ask to consent, but has not given consent in writing as of the time of this filing.

The letter from Respondent granting permission is enclosed.

2. Philippine Alliance of Human Rights Advocates (PAHRA). Founded in 1986, PAHRA is an alliance of organizations, institutions and individuals committed to the promotion, protection and realization of human rights. The majority of its members are based in Metro Manila, but it has provincial and regional counterparts in other parts of the country. PAHRA was formed as a consolidation of the human rights movement in the country and as an acknowledgment of the role played by some 50 human rights organizations in the struggle against the Marcos dictatorship. Since its founding, it has served to promote cooperation and coordination among human rights groups in the country. It is currently affiliated with the International Federation of Human Rights based in Paris, France. Max de Mesa is the current Chairperson of PAHRA.

3. Task Force Detainees of the Philippines (TFD-P). TFD-P was established in 1974 by the Association of Major Religious Superiors in the Philippines. It became a pioneering human rights organizations and responded to the needs of the early Marcos martial law victims, mobilizing church workers and other volunteers to document the arbitrary detention and torture during the Marcos period. Its careful documentation and monitoring of the abuses has served as a source of evidence since the lifting of martial law. It has also conducted education programs on human rights principles. TFD-P is currently a member of the International Federation of Human Rights (FIDH), based in Paris, France. In 1990, it was

nominated for the Nobel Peace Prize and, in 2004,TFD-P was a UNESCO awardee for human rights education. Its current Executive Director is Sister Cress Lucero.

4. Families of Victims of Involuntary Disappearance (FIND). This is a nationwide mass organization of families, relatives, friends of the disappeared victims and surfaced desaparecidos advocating for human rights and social transformation. FIND has actively participated in the global effort to eradicate the practice of involuntary disappearance. It has a consultative status with the U.N. Economic and Social Council (ECOSOC) and is active in providing reports and demanding solutions to stop involuntary disappearance during regular UN sessions. This organization has continued to search and conduct forensic identification missions in mass graves and in places where victims have been buried. It is currently working for national legislation to criminalize forced disappearance. Nilda L. Sevilla is its current Chairperson.

5. BALAY Rehabilitation Center. Established in 1985, BALAY literally means "home" for the victims of human rights violations. It emphasizes the holistic approach in addressing problems of displacements and is working together with other human rights organizations and governmental bodies towards achieving peace and social transformation. This organization provides psychosocial rehabilitation services, especially in areas where displacements happen, and provides the basic psychosocial needs of

victim survivors of torture, forced disappearance, and internal displacements arising from armed conflict, forced eviction, political detention, extrajudicial killings and summary execution. Lourdes de la Cruz is its current Executive Director.

6. Amnesty International – Pilipinas. This organization was formed in 1987, after the downfall of the Marcos Regime, and is affiliated with Amnesty International based in London. AI-Pilipinas undertakes human rights education work and promotes efforts for public awareness on human rights. It has campaigned for the abolition of death penalty and for the adoption of anti-torture laws, and has put together national reports of human rights abuses in the country for international campaigns. Dr. Aurora Parong is its current Executive Director.

7. Asian Federation Against Involuntary Disappearance (AFAD). This is a federation of organizations concerned in the issue of involuntary disappearances in Asia. AFAD's objectives are: (1) to build and develop international solidarity among organizations concerned with disappearances within Asia, (2) to campaign against government measures that perpetuate governmental impunity, and (3) to work for the adoption of international instruments in the United Nation system aimed at facilitating the resolution of cases of involuntary disappearances and preventing their recurrence. AFAD has eight national organizations in seven countries covering South and

Southeast Asia. Aileen Bacalso is its current Secretary General.

8. Medical Action Group. This organization was formed in 1982 by a group of doctors, nurses, and concerned individuals who saw the need for the health sector to respond collectively and speak against the grave human rights violations perpetrated by the Marcos regime. Since then, it has widened its membership to include nurses, dentists, psychologists, health students, and health workers. This Group has rendered health services to political prisoners, urban poor, internally displaced persons, and workers. Ederlina Fernandez is its current Executive Director.

9. Alliance of Progressive Labor (APL). The Alliance of Progressive Labor is a national labor center that was established in 1996. It is committed to promoting the union movement. APL is currently affiliated with the Asian Labor Network on the IFIs (ALNI) and fourteen campaign and issue-based organizations involving local and international concerns. Joshua Mata is its current Secretary-General.

STATEMENT OF THE CASE

In this interpleader action, assets valued at the time of trial at about $35,000,000 held in a Merrill Lynch account (in the name of "Arelma," a shell corporation) were awarded, after a protracted and difficult discovery process and a bench trial, to the

members of a Class of Human Rights Victims who were killed, disappeared, or tortured at the hands of Ferdinand E. Marcos from 1972 to 1986, when he governed the Philippines in a dictatorial fashion through martial law.

Ferdinand Marcos declared martial law on September 21, 1972 and proceeded to govern by autocratic decree, issuing almost daily lists of individuals who were to be rounded up. The district court explained that "MARCOS gradually increased his own power to such an extent that there were no limits to his orders of the human rights violations suffered by plaintiffs in this action." *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1463 (D.Haw. 1995). The district court's listing of the various torture techniques utilized by Marcos included the following:

> 1. Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;
>
> 2. The "telephone" where a detainee's ears were clapped simultaneously, producing a ringing sound in the head;
>
> 3. Insertion of bullets between the fingers of a detainee and squeezing the hand;
>
> 4. The "wet submarine", where a detainee's head was submerged in a toilet bowl full of excrement;
>
> 5. The "water cure", where a cloth was placed over the detainee's mouth and nose,

and water poured over it producing a drowning sensation;

6. The "dry submarine", where a plastic bag was placed over the detainee's head producing suffocation;

7. Use of a detainee's hands for putting out lighted cigarettes;

8. Use of flat-irons on the soles of a detainee's feet;

9. Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;

10. Injection of a clear substance into the body a detainee believed to be truth serum;

11. Stripping, sexually molesting and raping female detainees; one male plaintiff testified he was threatened with rape;

12. Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;

13. Russian roulette; and

14. Solitary confinement while hand-cuffed or tied to a bed.

Id. Marcos fled the Philippines in March 1986, after a series of "People Power" demonstrations filled the streets of Manila to protest a rigged election, and he

went into exile in Honolulu, Hawaii. Hawaii was thus the only place where personal jurisdiction could be obtained over Marcos, and was the only location where the Victims could pursue their claims in a venue that would satisfy international requirements of due process and fairness.

The claims of the Victims were vigorously contested by Marcos's attorneys, but the jury's judgment in favor of the Victims was affirmed on appeal and is now final. *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), and *Hilao v. Estate of Marcos,* 103 F.3d 762 (9th Cir. 1996). Since then, the members of the Class have been attempting to collect their judgment, and have active cases now in Colorado, Texas, Singapore, and the Philippines, in addition to the present interpleader action. Because of the difficulty of these collection efforts, however, no distribution of any compensation has thus far been made to any members of the Class of Victims.

The Philippine National Bank and Arelma participated actively in the present interpleader, but offered no evidence whatsoever supporting the view that the assets at issue had initially been obtained illegally or improperly by Marcos. The Republic of the Philippines and its Presidential Commission for Good Government (PCGG) made several appearances in the interpleader proceedings to assert their sovereign immunity, but presented no evidence regarding the origin of the disputed assets. The court of appeals affirmed that the Human Rights Victims should be

awarded the assets. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 464 F.3d 885 (9th Cir. 2006) and 467 F.3d 1205 (9th Cir. 2006). The court of appeals noted that the Class is "composed of victims of a rough and rapacious ruler, who often exercised arbitrary power." *Id.* at 890. It emphasized that "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic," and explained that although the Arelma assets "will scarcely satisfy" the judgment obtained by the Human Rights Victims, *id.*, at 893, "[n]onetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them." *Id.* at 893-94. The court of appeals affirmed that the Republic and its PCGG should be able to invoke foreign sovereign immunity, but determined (based on its evaluation of the factors listed in Rule 19(b) of the Federal Rules of Civil Procedure) that the Republic and its PCGG were not indispensable parties and that it had been proper for the district court to proceed with the interpleader action in their absence.

SUMMARY OF ARGUMENT

This Honorable Court must not dismiss this case, because to do so would allow any foreign government to block every effort of victims of human rights abuses – as well as all other judgment creditors – by

simply claiming ownership of the assets at issue without any evidentiary support for the claim whatsoever. Petitioners' effort in the present case is particularly inappropriate and unacceptable because the Republic of the Philippines (in an *amicus curiae* brief it filed in 1987) encouraged the U.S. courts to provide a venue for the underlying claims of the Human Rights Victims and also because the Republic has taken no steps to provide compensation for the Human Rights Victims, despite its obligation to do so under international law. The Swiss Federal Court and the U.N. Human Rights Committee have both reminded the Philippine government of this obligation in the context of this case, but the Republic has taken no action whatsoever to assist the Victims.

The U.S. Congress has explicitly provided jurisdiction for the underlying claims of the Victims in the Alien Tort Statute, 28 U.S.C. sec. 1350, and in the Torture Victim Protection Act (TVPA), Pub.L. 102-256, 106 Stat. 73, and this Court has explained that jurisdiction exists in U.S. courts for foreign victims of torture and extrajudicial murder. *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). Human rights abuses are continuing in the Philippines, and it appears that the Philippine government does not yet accept its responsibility to prevent such abuses. Allowing the Human Rights Victims to collect a portion of their judgment through the present interpleader action will assist in confirming the importance of human rights in the Philippines and around the world.

ARGUMENT

I. THE REPUBLIC OF THE PHILIPPINES AND ITS PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG) SHOULD NOT BE ABLE TO BLOCK THE EFFORTS OF HUMAN RIGHTS VICTIMS TO COLLECT THEIR JUDGMENT BASED ON AN UNSUBSTANTIATED ALLEGATION THAT ASSETS OF A FORMER DICTATOR BELONG TO THE REPUBLIC.

Petitioners seek the dismissal of this interpleader action based solely on their totally unsubstantiated assertion that the assets at issue were obtained illegally by Marcos, that the Republic and its Presidential Commission on Good Government (PCGG) are thereby entitled to these assets, and that the Republic and its PCGG were indispensable parties requiring dismissal of the interpleader. If this Honorable Court were to permit a foreign government to disrupt a U.S. court proceeding based solely on such unsupported allegations, it would be impossible for U.S. courts to address issues related to assets located in the United States. If the Court orders the dismissal of the current proceeding, then every government on the planet – no matter how nefarious – will have the power to block human rights victims and other judgment creditors from ever collecting their judgments. The Republic's position is particularly outrageous, because it actively encouraged the U.S. courts to provide a venue for this litigation.

In the years immediately following Marcos's exile to Hawaii, the Philippine government (under President Corazon Aquino) actively supported the class action lawsuit being pursued in Hawaii by the human rights victims. In those early years, Philippine Minister of Justice Neptali A. Gonzales prepared a letter to the Deputy Minister of Foreign Affairs, Leticia R. Shahani, explaining that Marcos was not protected by any form of immunity: "Marcos may be held liable for acts done as President during his incumbency, when such acts, like torture, inhuman treatment of detainees, etc. are clearly in violation of existing law . . . the government or its officials may not validly claim state immunity for acts committed against a private party in violation of existing law." *See Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994). Even more significantly, the Republic of the Philippines filed an *amicus curiae* brief in the U.S. Court of Appeals for the Ninth Circuit in 1987, after the class action case had been dismissed by the district court on act of state grounds, urging the Ninth Circuit to reverse the ruling of the district court. The Republic stated that "foreign relations with the United States will not be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. co[illegible]ts." *Amicus Curiae* Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, Respondent's Appendix (RA) 1. In the complaint filed by the Republic in 1986 in the Southern District of New York in *Republic of the Philippines v. Marcos*, the Republic specifically alleged a gross pattern of human rights abuses by Marcos, including

torture and summary execution. *See* 806 F.2d 344, 348 (2d Cir. 1986). This filing confirms the Republic's knowledge of Marcos's conduct and its willingness to have U.S. courts review this conduct.

The courts of the United States did provide a venue for the Human Rights Victims during protracted litigation, and it has also provided venues for the Republic to pursue claims to assets in the United States, which the Republic has done repeatedly. ("The Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc)." *Merrill Lynch,* 464 F.3d at 892.) It is thus completely disingenuous and manipulative for the Republic to argue now that U.S. courts are inappropriate venues for the determination of ownership of assets located in the United States. It is particularly unacceptable to permit the Republic to block such an action without making even so much as an offer of proof with regard to its unsubstantiated contention that it has a superior right to the assets.

II. COUNTRIES HAVE A CONTINUING OBLIGATION TO PROVIDE COMPENSATION TO HUMAN RIGHTS VICTIMS WHO HAVE SUFFERED ABUSES AT THE HANDS OF PREVIOUS GOVERNMENTS.

Petitioners' Brief refers (at 4) to the 1997 and 1998 decisions of the Swiss Federal Court regarding assets in Swiss banks, but it fails to mention the

explicit conditions listed in those decisions regarding the obligations of the Republic of the Philippines to compensate properly the victims of human rights abuses. Referring specifically to the judgment of the Human Rights Victims underlying the present interpleader, the Swiss Court stated clearly in its ruling that the Philippine Government had a responsibility to ensure that the human rights victims receive adequate compensation for their injuries, that the Philippine government had a duty to keep the Swiss Government informed about the steps it took to provide compensation to the human rights victims, and that the Swiss Government should monitor the situation to ensure that such compensation was forthcoming. *Swiss Federal Office for Police Matters v. Fondation Maler,* 1A.91/1997/odi (Swiss Federal Court (Bundesgericht, Dec. 19, 1997), Joint Appendix (JA) 64 (Ex. 47) at 84 para. 7a. The Swiss Court explained directly that the Human Rights Victims "have claims of indemnity of damages and the right of fair process in prosecuting said claims under international law," specifically citing Articles 2 and 14 of the International Covenant on Civil and Political Rights[2]

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[2] Article 2(3)(a) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, which has been ratified by 160 countries, including the United States, the Philippines, and Switzerland, says that:

> Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has

(Continued on following page)

as well as the Torture Convention[3] and Philippine law. *Id.* at 84 para. 7a. The Swiss Court said without qualification that "the Philippine government is liable for indemnification of the victims, according to international law." *Id.* at 85 para. 7a. The Swiss Federal Court went into this subject in further detail in a decision it issued nine days earlier, explaining that both the Philippines and Switzerland had duties under international law to "safeguard[] human rights" and that this duty is "incumbent upon . . . the courts as executors of the international law regime." *Federal Office for Police Matters v. Aguamina Corp.*, 1A.87/1994/err (Swiss Federal Court, Dec. 10, 1997), para. 7(c). The Swiss Court recognized that all parties to the International Covenant of Civil and Political Rights and the Torture Convention have a duty to

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been committed by persons acting in an official capacity . . .

Emphasis added.

[3] Article 14(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, says that:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has *an enforceable right to fair and adequate compensation* including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Emphasis added. The United States, the Philippines, and Switzerland are all contracting parties to the Torture Convention.

ensure that victims of human rights abuse have a right to establish their right to compensation through competent judicial tribunals. *Id.*, para. 7(c)(aa) and (cc).

The Swiss Court also recognized in its decision of December 10, 1997, that the Philippine judiciary has "shortcomings" and that it is "reputed to be ponderous and susceptible to corruption and political influence." *Id.*, para. 7(c)(ee). For this reason, the Swiss Court included as a condition of transferring the money to the Philippines the requirement that the Philippine government "regularly update" the Swiss authorities on the procedures established "to compensate the victims of human rights violations under the Marcos regime." *Id.*, para. 7(c)(hh). These conditions have never been fulfilled, and the Philippine Government has never provided any mechanism whatsoever to compensate those who suffered grievously during the Marcos martial law period.

The responsibility of countries to allow victims of human rights abuses to gain compensation for their suffering is well established in international law. In addition to the treaties cited by the Swiss court, this principle is also found in Article 8 of the 1948 Universal Declaration of Human Rights, U.N.G.A. Res. 217A, which says that "Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (emphasis added). Regional human rights treaties also emphasize the right to redress for human rights violations, and the

consistent language in all the relevant human rights treaties provides strong evidence that this responsibility is a norm of customary international law. Article 6(1) of the European Convention on Human Rights, 213 U.N.T.S. 221 (1950), says that "[i]n the determination of his civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Similarly, Article 25(1) of the American Convention on Human Rights, 144 U.N.T.S. 123 (1969),[4] says that:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Decisions in the Inter-American system confirm that the right to an effective remedy is a continuing one that cannot be waived. The seminal case of the Inter-American Court of Human Rights is the *Velasquez*

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[4] The United States has signed, but has not yet ratified this Convention. Under Article 18(a) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, the United States is thereby "obligated to refrain from acts which would defeat the object and purpose" of the Convention.

Rodriguez Case, 28 I.L.M. 291, para. 174(d) (1989), which held that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation." In this decision, the Inter-American Court of Human Rights emphasized that the duty to investigate human rights abuses and compensate the victims of these abuses continues despite "changes of government" even if "the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred." *Id.* at 327-28 para. 184. The Republic of the Philippines has never recognized or accepted these responsibilities despite its clear obligation to do so.

On March 19, 2007, the Geneva-based U.N. Human Rights Committee, which is entrusted with interpreting and applying the International Covenant on Civil and Political Rights (in a unanimous report joined by 14 members of the Committee including the U.S. member, Professor Ruth Wedgwood) said that the Republic of the Philippines had violated Article 14(1) and Article 2(3) of the Covenant by imposing unacceptable restrictions on the efforts of the Human Rights Victims to file their U.S. judgment in the courts of the Philippines for purposes of collection, and the Committee reiterated that the Republic "is under an obligation to ensure an adequate remedy to the authors [the Human Rights Victims] including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party [the Philippines]." *Communication No. 1320/2004,*

Human Rights Committee, CCPR/C/89/D/1390/2004 (April 3, 2007), RA-12, 23 para. 11.

The United States also has an obligation to facilitate the efforts of the Human Rights Victims in their efforts to collect their judgment, and a dismissal of the present interpleader would be inconsistent with that obligation. In the *amicus curiae* brief filed by the Solicitor General in the present case, at 32 n.6, it is contended (based on a citation to a 1990 Congressional Record) that the U.S. obligation to provide a remedy to torture victims is limited to torture occurring in the United States. It is clear, however, that Congress understood that the United States had a broader obligation, because two years later, in 1992, it enacted the Torture Victim Protection Act (TVPA), Pub.L. 102-256, 106 Stat. 73 (1992), which explicitly provides a remedy to any individual who is subjected to torture or extrajudicial killing by anyone acting "under actual or apparent authority, or color of law, *of any foreign nation.*" *Id.* sec. 2(a) (emphasis added). As this Court has explained, the TVPA "provid[es] authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (quoting from H.R. Rep. No. 102-367, pt. 1, p. 3 (1991)). This statute, along with the Alien Tort Statute, 28 U.S.C. sec. 1350, provided the jurisdictional basis for the claims brought by the Human Rights Victims in the underlying case, and a dismissal in the present case would cause those statutes to become meaningless, because it would be

impossible for any victims to collect their judgment. This Court has explained in *Sosa v. Alvarez-Machain*, 542 U.S. 592 (2004), that the Alien Tort Statute provides jurisdiction for claims brought by aliens for human rights abuses in their home countries if those abuses violate widely-accepted international norms with definite content, *id.* at 732, such as "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Providing a forum in U.S. courts for the adjudication of such claims "will not significantly threaten the practical harmony that comity principles seek to protect" because "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Id.* at 762-63 (Breyer, J., concurring). If this Honorable Court were to dismiss the present case, the goal of providing "civil tort recovery" will have been thwarted.

III. HUMAN RIGHTS ABUSES ARE CONTINUING IN THE REPUBLIC OF THE PHILIPPINES, AS DOCUMENTED AT A HEARING HELD IN THE U.S. SENATE AND A REPORT RECENTLY ISSUED BY A U.N. RAPPORTEUR.

The recent surge in human rights abuses attributed to the Philippine military demonstrates the importance of a judicial remedy in this case. On March 14, 2007, the Subcommittee on East Asian and Pacific Affairs of the United States Senate's International Relations Committee held a Hearing on Extrajudicial

Killings in the Philippines, receiving witnesses who confirmed that human rights abuses are continuing in the Philippines. Those testifying provided reports of hundreds of extrajudicial killings during the last few years, with victims from all walks of life – farmers, fishers, workers, indigenous persons, Moro persons, journalists, human rights workers, lawyers, doctors, teachers, church officials, women, and children. It is widely thought that the Philippine military is involved in these killings and that it operates with the knowledge and support of the current Philippine government.

The testimony submitted by T. Kumar on behalf of Amnesty International contained the following summary:

> The number of attacks on leftist activists and community workers rose sharply during the last couple of years. Most of the attacks were carried out by unidentified assailants on motorcycles, at times wearing face masks, who were often described as "vigilantes" or hired killers allegedly linked to Armed Forces of the Philippines (AFP). In some cases, those attacked had reportedly been under surveillance by people linked to the security forces or had received death threats.
>
> Those most at risk include members of legal leftist political parties, including Bayan Muna (People First) and Anakpawis (Toiling Masses), other human rights and community activists, priests, church workers, and lawyers regarded by the authorities

> as sympathetic to the broader communist movement. . . .
>
> A climate of impunity shielding the perpetrators of such killings deepened as ineffective investigations failed to lead to the prosecution of those responsible. In many cases witnesses were reportedly too frightened to testify.

Amnesty International USA, Senate Hearing Testimony – Extrajudicial Killings in the Philippines – Strategies to End the violence, March 14, 2007, at <http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070314001> (last visited Feb. 3, 2008).

About the same time, United Nations Rapporteur Philip Alston issued a report on the extrajudicial killings, implicating the Philippine military. Professor Alston visited the Philippines in February 2007 and issued a report characterizing the killings as "a grave and serious problem," stating that the Philippine military "remains in a state of almost total denial . . . of its need to respond effectively and authentically to the significant number of killings which have been convincingly attributed to them." Press Statement issued by Prof. Philip Alston, U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Feb. 21, 2007, at 3, available at <http://www.extrajudicialexecutions.org/news/Philippines_21_Feb_2007.pdf> (last visited Feb. 3, 2008). Professor Alston also stated that President Arroyo has a responsibility "to persuade the military that its reputation and effectiveness will be considerably enhanced, rather

than undermined, by acknowledging the facts and taking genuine steps to investigate." *Id.* at 3-4.

Professor Alston explained that although the exact number of killings cannot be determined, the number who have been killed "is high enough to be distressing" and that the type of killings alleged "is corrosive in many ways" because it "intimidates vast numbers of civil society actors, it sends a message of vulnerability to all but the most well connected, and it severely undermines the political discourse which is central to a resolution of the problems confronting this country." *Id.* at 2.

The continuing "denial" of the Republic's leadership and its military regarding the need to respect fundamental human rights brings into focus the importance of the present case and its role in promoting respect for human rights in the Philippines and around the world. All international human rights treaties stress the importance of providing real remedies for the victims of human rights and charge governments and their courts with carrying out this responsibility.

The members of the Class of Human Rights Victims have been seeking compensation for 22 years, since their complaint was first filed in the U.S. District Court for the District of Hawaii in 1986. For the past dozen years, they have been diligently seeking to collect the judgment awarded by a federal jury and affirmed on appeal. The court of appeals has reviewed the present interpleader and affirmed that the assets

at issue should be awarded to the Human Rights Victims. A reversal of this decision would be directly inconsistent with the treaty obligations of the United States and the Philippines, and would be a huge setback to the international efforts to enforce human rights norms and protect the fundamental human rights of every individual.

CONCLUSION

For the reasons set forth above, this Court should not order dismissal of this action and should affirm the ruling of the court of appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

~~**MOTION OF PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE**~~
BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND BRIEF FOR PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION OF PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of this Court, Professors of International Law respectfully move the Court for leave to file a brief of *amici curiae*. Counsel for Respondents have granted consent for this submission. While consent was sought from Counsel for Petitioners, *Amici* did not receive a final decision from them on whether they granted consent.

This *amici curiae* brief is submitted by 25 law professors who teach international law, with many emphasizing international human rights law. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. These professors wish to emphasize the importance of allowing victims of torture, extrajudicial killing, and forced disappearances to pursue their claims in U.S. courts pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note), and as authorized by this Court in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004).

This Court's previous rulings make clear that claimants should normally be allowed to pursue their claims and to collect their judgments under U.S. law, and that assertions of sovereign immunity should be resolved by applying neutral, well-established legal

principles rather than political considerations. The Respondents are entitled to collect on their judgment through the present interpleader action for four reasons: (1) because the Republic of the Philippines previously urged U.S. courts to provide a venue for their claims; (2) because the Republic has made no effort to provide compensation to the members of the Class of Human Rights Victims in the Philippines; (3) because the Republic has provided no evidence whatsoever that it is entitled to the interpleaded assets; and (4) because treaties that the United States and the Philippines are parties to confirm that countries must provide effective remedies to victims of grave human rights abuses.

Given their expertise, *Amici* would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations. *Amici* have filed a joint brief to reduce multiple filings with the Court. Moreover, *Amici* seek to avoid repeating arguments made by the parties.

For these reasons, *Amici* respectfully request that the Court grant this motion for leave to file.

Dated: February 26, 2008

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

This *amicus curiae* brief is respectfully submitted by twenty-five law professors who teach in the fields of international law and human rights law.[1] They urge this Honorable Court to affirm the ruling of the Ninth Circuit Court of Appeals and thus allow for funds to be distributed to the members of the Class of Human Rights Victims in partial payment of the judgment issued in their favor in the underlying case. Such a result would not only provide direct benefit to the Class members but would also serve to protect the human rights of individuals all over the world by confirming that the independent courts of the United States will apply and enforce the rule of law in an even-handed manner.

There are twenty-five law professors joining in the filing of this brief.[2]

S. James Anaya, James Lenoir Professor of Law and Human Rights, James E. Rogers College of Law, University of Arizona, Tucson, Arizona.

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no person or entity other than *amici curiae* and The JEHT Foundation made any monetary contribution to the preparation or submission of the brief. *Amici curiae* also state that Professor Jon M. Van Dyke, who is one of the counsel for the Class Human Rights Victims, assisted with the preparation of this brief. The printing costs for this brief were paid by The JEHT Foundation. Pursuant to Rule 37.3, *amici curiae* sought consent from both parties to file this brief. Counsel for Respondents granted consent for this submission. While consent was sought from Counsel for Petitioners, *Amici* did not receive a final decision from them on whether they granted consent.

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Amici are experts in matters of international law and human rights law. They would like to provide this Honorable Court with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations.

STATEMENT OF THE CASE

This appeal of an interpleader judgment concerns an attempt by the Class of Human Rights Victims in the Ferdinand E. Marcos Human Rights Litigation to collect a portion of the judgment awarded in 1995 to the Class and affirmed as a final judgment on appeal in 1996. The Victims were tortured, disappeared, or summarily executed during the 1972-86 martial law regime of Ferdinand E. Marcos in the Philippines. The case was brought pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note). To prevail, the Victims had to satisfy numerous requirements and establish their injuries to a federal court jury in litigation that was contested at every point by the attorneys representing Marcos (and later his Estate). The collection process has been difficult. In the present interpleader action, the Victims were awarded the assets from a Merrill Lynch Account (Arelma assets) established by Marcos in 1972.

The rulings by the trial and appellate courts in this litigation have confirmed and clarified many important principles related to the protection of

fundamental human rights. These rulings have generated an extensive literature and have been analyzed in numerous law review articles, books, and casebooks.[3] The rulings by the Court of Appeals affirming the verdicts in favor of the Human Rights Victims have been cited by more than 100 other opinions during the past decade.

The present interpleader was brought to resolve ownership of a Merrill Lynch account established by Ferdinand E. Marcos in 1972. After years of hotly-contested discovery and a bench trial, the trial court awarded the account, which had grown to about

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[3] *See, e.g.*, Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1989: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995); Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANS. LAW 325 (1998); Riza DeJesus, *Retroactive Application of the Torture Victim Protection Act to Redress Philippine Human Rights Violations*, 2 PAC. RIM LAW & POL. J. 319 (1993); Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad*, 14 B.C. THIRD WORLD L.J. 43 (1994); Sol Schreiber and Laura D. Weissbach, *In re Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 LOY. L.A. L. REV. 476 (1998); Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773 (2000); Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE LAW JOURNAL 169-93 (2001) (University of the Philippines); WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 119-25 (2007).

$35,000,000 at the time of trial, to the Class of Human Rights Victims. The Republic of the Philippines challenged this ruling, arguing that it could not be required to participate in the interpleader action because it had sovereign immunity, and the interpleader action could not be conducted by the U.S. courts because it was an indispensable party. The Court of Appeals affirmed the trial court's verdict, confirming the district court's conclusion that the Republic was not an indispensable party because it had virtually no chance of establishing its claim to the disputed assets and hence the interpleader was an adequate method of assigning ownership of the account and protecting Merrill Lynch against conflicting claims. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 464 F.3d 885 (9th Cir. 2006).

SUMMARY OF ARGUMENT

This Honorable Court should affirm the ruling of the Court of Appeals that the Republic of the Philippines and its Presidential Commission on Good Government (PCGG) are not indispensable parties under Rule 19(b) of the Federal Rules of Civil Procedure and, therefore, the Arelma assets should be awarded to the Class of Human Rights Victims. The members of this Class were victims of torture, extrajudicial killing, and forced disappearances during the

1972-86 martial law regime of Ferdinand E. Marcos in the Philippines. They pursued this action under the Alien Tort Statute and the Torture Victim Protection Act with the active encouragement of the Republic of the Philippines, as evidenced by its 1987 *amicus curiae* brief. During the interpleader action, no evidence whatsoever was offered that would support the position of Petitioners that the Arelma assets belonged to the Republic of the Philippines nor was any offer of proof made to support that position. The district court evaluated the evidence in the record and ruled that the assets belonged to the Marcos Estate, and this was affirmed by the Court of Appeals. The members of the Class of Victims followed the course of action recommended by the Court of Appeals in its 1996 opinion, *In re Estate of Ferdinand Marcos Human Rights Litigation,* 94 F.3d 539, 547 (9th Cir. 1996), and they should now receive partial collection of their judgment.

Neither the United States, in its *amicus curiae* brief, nor Petitioners in their brief, have identified any significant impact on foreign relations that will occur if the Court of Appeals decision is affirmed. No such result can be expected because the Philippines and the United States have worked with other nations to recognize that countries should provide forums to allow victims to bring claims against those who commit grave human rights abuses. The members of the Class of Human Rights Victims could bring their claim against Marcos only in the U.S. District Court for the District of Hawaii because

Marcos was living in Honolulu and this was the only court that had personal jurisdiction over him. The Republic of the Philippines has made no effort whatsoever to provide any compensation for the Victims despite its obligation to do so under international law.

This Court has explained that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). The lower courts followed this instruction and applied Rule 19(b) of the Federal Rules of Civil Procedure, evaluating the impact of the award on the Republic in light of the statute of limitations barring its claim, and concluded that the interpleader proceeding was fair and adequate for all parties. This ruling should be affirmed.

ARGUMENT

I. THE JUDGMENT AWARDED TO THE CLASS OF HUMAN RIGHTS VICTIMS IN THE CASE UNDERLYING THE PRESENT INTERPLEADER WAS BASED ON PRINCIPLES APPROVED BY THIS HONORABLE COURT.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Honorable Court examined the history behind the enactment of the Alien Tort Statute, explaining that it was designed to provide jurisdiction over

claims asserting violations of the law of nations, and was enacted on the understanding that the federal courts would recognize a common law cause of action for certain violations of the law of nations. This Court pointed to three torts recognized in the late eighteenth century as violating the law of nations – piracy, assaults on diplomats, and violations of safe passage – and held that modern courts should recognize causes of action for torts that gained the same wide acceptance and had the same specificity as the three torts that existed at the time of the statute's enactment. The Court's opinion noted that Congress intended this statute to have a "practical effect" of allowing foreigners to bring claims in U.S. courts for "international law violations with a potential for personal liability," *id.* at 719, 724, in order to promote the overall goal "'that the peace of the world may be maintained.'" *Id.* at 723 (*quoting* 4 BLACKSTONE, COMMENTARIES 68). This Court cited with approval the approach and analysis taken by the federal courts in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in the case underlying the present matter, *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994), which both examined international law documents and precedents in detail to conclude that torture and extrajudicial killing violate fundamental norms of international law and that these concepts had been defined with specificity. The *Sosa* opinion also recognized that when Congress enacted the Torture Victim Protection Act, it confirmed that U.S. federal courts should permit "federal

claims of torture and extrajudicial killing," *Sosa*, 542 U.S. at 728 (*citing* H.R. Rep. No. 102-367, pt. 1, at 3 (1991)), and that this statutory enactment provides "authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *Id.* Because of the explicit congressional authorization through the TVPA of claims based on torture and extrajudicial killing, the claims brought by and the judgment obtained by the Class of Human Rights Victims in the present case did not present "the possibility that judges may create rights where Congress has not authorized them to do so," which Justice Scalia expressed concern about in his concurring opinion. *Sosa*, 542 U.S. at 747 (Scalia, J., concurring, joined by Rehnquist, CJ., and Thomas, J.).

In *Sosa*, this Court explained that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations," *id.* at 729, confirming that the rule of law has power and importance in U.S. courts and that the independent courts of our country will enforce and apply governing principles of international law. It is also clear that the international community has reached "procedural agreement that universal jurisdiction exists to prosecute" those government officials who commit torture and extrajudicial murder and that providing "universal tort jurisdiction" "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring). Indeed, in an *amicus curiae* brief filed by the

Republic of the Philippines in 1987 (discussed in more detail *infra*), the Republic explained that:

> The Republic of the Philippines has ... joined forces with other nations of the world to condemn torture and other arbitrary use of force against individuals. The United States has also been at the forefront of this movement. . . . Because all nations have condemned torture and murder under color of law and the United States and the Philippines have worked together to establish the prohibition of torture and murder by governments of their citizens as a peremptory norm of international law, no judge need shy away from examining allegations that these clear principles of law have been violated.

Amicus Curiae Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, Respondent's Appendix (RA) 1, 5-6. It would be a cruel irony if our courts, after acknowledging the legitimacy of claims based on torture and extrajudicial killing, adopted a rule on indispensability that had the effect of making it impossible for victims of human rights abuses ever to collect their judgments.

the Republic of the Philippines – despite its earlier strong support for the case – has opposed their efforts by making claims to whatever assets the Victims identify and pursue.

In *In re Estate of Ferdinand Marcos Human Rights Litigation,* 94 F.3d 539 (9th Cir. 1996), which involved one of the earliest collection efforts, the Ninth Circuit quoted from the Republic's 1987 *amicus* brief, noting that "the Republic's own subsequent actions" were interfering with the efforts of the Human Rights Victims to collect their judgment. *Id.* at 547. The Court of Appeals recognized the irony of this interference and provided a roadmap to the Victims, explaining that the Republic's actions should be interpreted as having "stated that [the Class of Victims] should be permitted to seek damages from *whatever assets the Estate [of Marcos] could establish as its own.*" *Id.* (emphasis added).

The Class of Human Rights Victims is entitled to the assets involved in the present interpleader because they have followed the clear instructions provided by the Ninth Circuit in this previous ruling. The Class has followed this guidance provided by the Court of Appeals and was, in fact, successful in establishing that the assets involved in the present interpleader were "assets of the Estate [of Marcos]," Tr.Ct.Op., Pet.App. at 53a; Ct.Ap.Op., Pet.App. at 10a, as well as their own priority to these assets. Establishing that the Arelma Account was opened by Marcos with his own assets was central to the evidentiary record developed in the present case through

extremely difficult and heavily-contested discovery proceedings which took place in locations around the globe. Lower courts stated explicitly that Marcos *was* the owner of the assets deposited into the Arelma Account and that he remained owner of this Account, until his death, when it became property of his Estate. In its Findings of Fact, the trial court said that "[t]he purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and *there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos*." Tr.Ct.Op., Pet.App. at 53a (emphasis added). The Court of Appeals agreed, saying that "Arelma is a shell corporation . . . and the court may look through the corporate form to *Marcos, the owner of its assets*." Ct.Ap.Op., Pet.App. at 10a (emphasis added).

The Republic has had every opportunity to establish its claim to these assets but has failed to do so in any U.S. or Philippine court. Indeed, the Republic can still try to pursue these assets against Merrill Lynch in a U.S. or Philippine court. But it should not be permitted to overturn a final judgment of a U.S. court based solely on its totally speculative and unsubstantiated assertion that it is entitled to the assets. A dismissal in the present case would only add further delay to this proceeding because any effort by the Republic to assert ownership of the disputed Arelma Account would lead to another interpleader action, which (because of the statute of limitations barring the Republic's claim) would eventually lead once

II. THE CLASS OF HUMAN RIGHTS VICTIMS ARE ENTITLED TO COLLECT ON THEIR JUDGMENT BECAUSE THEY HAVE FOLLOWED THE CLEAR INSTRUCTIONS PROVIDED BY THE NINTH CIRCUIT.

When the Class members first filed their claims against Ferdinand E. Marcos for torture, extrajudicial killing, and forced disappearances, the Republic of the Philippines provided strong support for their efforts and urged the U.S. courts to provide jurisdiction to allow the case to proceed. The U.S. District Court for the District of Hawaii was, in fact, the only venue where the Victims' claim could be filed because Marcos was residing in Honolulu, and this jurisdiction was the only place where personal jurisdiction could be obtained over him. After the district court dismissed their claims based on the act of state doctrine in 1986, the Republic filed a very strong *amicus curiae* brief in 1987, stating that the U.S. courts should "allow Plaintiffs . . . to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court." *Amicus Curiae* Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, RA 1, 1. The *amicus* brief addressed and dismissed the concerns that often underlie the act of state doctrine. It asserted:

> without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are

> heard in U.S. courts; and in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. . . .

Id. at 11 (emphasis in original).

In many situations, a representation made by a party in litigation becomes binding on the party in subsequent phases of the litigation. The Court of Appeals explained in a 2004 ruling that "[a] party (or, in this case, a nonparty) is bound by concessions made in its brief. . . ." *Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) (*citing United States v. Crawford,* 372 F.3d 1048, 1055 (9th Cir. 2004) (*en banc*), *cert. denied,* 543 U.S. 1057 (2005)). In that ruling, the Court of Appeals explained that the Republic was bound by statements it made "in both its briefing and at oral argument" that it was not bound by a conditional settlement agreement entered into between the Class of Human Rights Victims and the Marcos Estate. *Id.* "In view of the Republic's concession that it is not bound by the settlement agreement, its argument for nonparty appellate standing to challenge the same agreement collapses." *Id.*

Since the judgment in favor of the Class became final in 1996, after all appeals were exhausted, the Class members began their efforts to collect on their judgment. This process has been very difficult because

again to a ruling awarding the Account to the Victims.

III. THE UNITED STATES HAS NOT ASSERTED THAT ANY SERIOUS REPERCUSSIONS RELATED TO FOREIGN RELATIONS WILL FOLLOW FROM AFFIRMANCE OF THE RULING BELOW.

The *amicus curiae* brief filed by the United States in this case does not assert that any significant foreign relations difficulties will arise if the rulings below are affirmed. Petitioners' brief likewise fails to identify any significant difficulties that will result from allowing the Victims to collect on their judgment in this litigation, particularly in light of the active efforts by the Republic of the Philippines to utilize U.S. courts to recover assets themselves. Although the Republic clearly knew about the Arelma Account as early as 1986 and utilized U.S. courts to block access to this account in 1987, it thereafter failed to make any effort whatsoever, in either a U.S. or Philippine court, to establish that it is entitled to this Account. Thus, it cannot be said that the Republic's belated interest in the Account will present any difficulties in U.S.-Philippine relations. U.S. courts responded to the wishes expressed by the Republic in its 1987 *amicus curiae* brief when the underlying litigation began, expended substantial judicial resources to allow the litigation to be pursued, and should now apply neutral principles of law to affirm the rulings of the lower courts in the interpleader. In

addition, the views of the Executive Branch are necessarily less relevant when the question is one, as here, concerning the management of court processes and judicial management of cases, rather than the question of whether an underlying claim should be allowed to proceed. The United States, for instance, filed an *amicus curiae* brief in *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (*en banc*), explaining to the court that the act of state doctrine should not be invoked to block litigation by the Republic to collect Marcos's assets. The court relied on that assurance in reaching its conclusion, *id.* at 1360, but, notably, did not follow the recommendations of the U.S. *amicus* brief with regard to the issuance and scope of the injunction, which is more traditionally a matter of judicial management and thus a decision for the independent courts to make. *See id.* at 1370-71 (opinion of Schroeder, J., joined by Canby, J., concurring and dissenting in part, criticizing the majority for evaluating the injunction issue in a manner that was inconsistent with the recommendations of the U.S. *amicus* brief).

Allowing litigants to collect on their judgment against the assets of the tortfeasor is an essential element to the vindication of these principles. Other cases involving both the Republic and the Marcos assets in U.S. courts have not adversely affected United States relations with the Philippines.

IV. COUNTRIES HAVE A CONTINUING OBLIGATION TO PROVIDE COMPENSATION TO VICTIMS OF HUMAN RIGHTS ABUSES, EVEN IF A NEW ENLIGHTENED GOVERNMENT HAS REPLACED THE PREVIOUS DESPOTIC REGIME.

In the present case, the Ninth Circuit explained that the members of the Class were "victims of a rough and rapacious ruler, who often exercised arbitrary power." *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 464 F.3d 885, 894 (9th Cir. 2006). And despite the passage of 21 years since Marcos was forced out of office, "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." *Id.*

The Republic's duty to compensate the members of the Class was explicitly recognized by the Swiss Federal Court when it conditionally returned funds in Swiss banks to the Republic, but explained in its opinion that the Philippine government had a duty to compensate the Marcos victims. Indeed, the Swiss Court explicitly referred to the class action brought in the District Court for the District of Hawaii by the present Class of Human Rights Victims. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997), Ex. 47, JA 64, 84-86. It also confirmed that the duty of a successor government to provide compensation to those whose human rights have been abused by a previous government is firmly established in

international law. It based this conclusion on Article 2(3)(a) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, which has been ratified by 160 countries including the Philippines and the United States, and which states that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . .", and on Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), which has also been ratified by the United States and the Republic of the Philippines, and which states that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[4]

Numerous decisions by international tribunals have made it clear that the duty to provide compensation for victims of human rights abuses is a central obligation and is one that continues even after a

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[4] The U.S. assertion that its ratification of the Convention against Torture was accompanied by an understanding that it was obliged only to provide a remedy for those tortured in the United States is undermined by Congress' subsequent enactment of the Torture Victim Protection Act, which was clearly designed to provide a remedy for those tortured outside the United States by officials of their own government.

change of government. The Inter-American Court of Human Rights, for instance, ruled in *The Velasquez Rodriguez Case*, 4 Inter-Am. Ct. H.R. (Ser.C) (1988), *reprinted in* 28 I.L.M. 291 (1989), that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation" and that the duty to compensate the victims of these abuses continues despite "changes of government" even if "the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred." *Id.* at 327-28.

The European Court of Human Rights has ruled similarly in the *Golder Case*, Ser.A, no.18 at 17 (Eur. Ct. H.R., May 7, 1974), that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognized' fundamental principles of law." More recently, in *Mentes v. Turkey* (Eur. Ct. H.R.), 37 I.L.M. 858 (1998), the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possessions, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure." *Id.* at 882.

V. THE ISSUE OF INDISPENSABILITY IN THIS CASE HAS ALREADY BEEN ADDRESSED UNDER THE IMMUNITY EVALUATION ESTABLISHED BY THE FOREIGN SOVEREIGN IMMUNITY ACT.

As this Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Congress enacted the Foreign Sovereign Immunities Act for the purpose of taking the determination of immunity out of the realm of politics and to establish a "comprehensive" "'set of legal standards'" that "'codifies . . . the restrictive theory of sovereign immunity'" and "transfers the primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 691 (*quoting Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This statute was passed for the purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims *and eliminating political participation in the resolution of such claims*." *Id.* at 699 (emphasis added).

Although it is clear that the Republic of the Philippines was entitled to invoke sovereign immunity to avoid participating in this interpleader action, it does not follow that it can use its immunity affirmatively to close down this altogether proper interpleader action. Its rights are preserved, and it can pursue any claim it may have against Merrill Lynch, and it can continue to pursue claims against the Marcoses.

But the Republic should not be permitted to close down this fully litigated interpleader action based solely on its unsubstantiated claim to the disputed

assets. Allowing the Republic to prevail in this proceeding would effectively make it impossible for any human rights victims to collect on their judgments. If U.S. courts were to establish such a rule, the United States would be in violation of its responsibilities to provide an effective forum for human rights victims to use to vindicate their rights.

VI. THE REPUBLIC'S REQUEST IS AN IMPERMISSIBLE AND UNPRECEDENTED DEMAND THAT U.S. COURTS ABSTAIN FROM ANY ACTION IN WHICH A FOREIGN GOVERNMENT ASSERTS AN INTEREST.

This Honorable Court has explained that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). This statement was made in a decision rejecting a claim based on the act of state doctrine, where this Court stated that "[t]he act of state doctrine is not some vague doctrine of abstention." *Id.* at 406. The Court interpreted the act of state doctrine narrowly and explained that this doctrine "does not establish an exception for cases and controversies that may embarrass foreign governments." *Id.* at 409.

Courts should abstain from deciding cases only in rare situations because litigants are entitled to have their claims adjudicated in courts. Certainly, the members of the Class of Human Rights Victims are entitled to have their day in court so they can pursue

collection in a case brought with the encouragement of the Republic, as evidenced by its 1987 *amicus curiae* brief.

Finally, courts must be able to facilitate an end to litigation, and the dismissal sought by the Republic will lead only to duplicative and protracted litigation. As the *amicus curiae* brief filed by Merrill Lynch explains, the Republic will only be able to obtain the disputed Arelma assets by bringing a claim against Merrill Lynch in a U.S. court, which will trigger another interpleader action, leading eventually to another determination in favor of the Victims. Because such an outcome is nonsensical, the rulings below should be affirmed.

CONCLUSION

For the reasons expressed herein, the rulings below in this interpleader action should be affirmed, and the members of the Class of Human Rights Victims should be allowed to collect a portion of their judgment.

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Respectfully submitted,

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